Supreme Court, U.S.
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DOCKET NO. _____

In The
Supreme Court of the United States

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TOMMY D. HOPKINS,
Petitioner,

v.

JOHN L. SAUNDERS, KYLE VICKERS, CHARLES AUSFAHL, ROY TEMPLE AND BETH M. WHEELER,
Respondents.

– ♦ –

Petition for Writ of Certiorari
To the United States Court of
Appeals For the Eighth Circuit

– ♦ –

1ST CORRECTED PETITION FOR WRIT OF CERTIORARI

– ♦ –

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4/6 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a **42 U.S.C. § 1983** plaintiff that was a tenured, public employee of the State of Missouri is entitled to relief in the form of reinstatement with back pay and benefits when the employee was terminated without benefit of due process in that he did not receive verbal or written notice prior to being terminated (Exhibit A to Second Amended Complaint, D.Ct. Doc. 43; Plaintiff's Hearing Exhibit 5; Appendix hereto at p. 123); was terminated without benefit of a pre-termination hearing; and, had to wait for over four (4) years for any type of post-termination hearing when:
   (a) the courts below determined that the employee had an established property right interest in his job;
   (b) the courts below determined that the employee was covered by a written merit system that stated he could only be dismissed for cause;
   (c) the written merit system that covered the employee set out specific procedures for termination that required that the employee be given specific written notice and a pre-termination hearing prior to termination; and,
   (d) the courts below determined that the written merit system that covered the employee contained specific language that states in pertinent part that:
      "No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the director gives to the employee a written statement setting forth in substance the reason therefore and files a copy of the statement with the board." **Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VIII(5).** (Exhibit 14 to D.Ct. Doc. 52; Plaintiff's D.Ct.

Hearing Exhibit 3; Appendix hereto at pp. 118-119).

2. Whether—in conformance with Missouri case law—the courts below should have declared a **42 U.S.C. § 1983** plaintiff's termination as being "null and void" for the employing agency's failure to follow its own written merit system procedures in the termination of the employee. **Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VIII(5).** (Exhibit 14 to D.Ct. Doc. 52; Plaintiff's D.Ct. Hearing Exhibit 3; Appendix hereto at pp. 118-119).

3. Whether the courts below were in error in denying a **42 U.S.C. § 1983** plaintiff a jury trial on claims that he was terminated in violation of his First Amendment right of freedom of speech in reporting wrongdoings and that he was terminated in violation of his Fourteenth Amendment right of equal protection under the law for handling of a sexual harassment complaint and reporting it to his supervisor; and/or, were the courts below in error in failing to make a "pre-textual" or "mixed motive" analysis as to the reasons as to a **42 U.S.C. § 1983** plaintiff's termination, and/or, were the courts below in error in failing to allow a jury to determine if the proffered reasons for termination of a **42 U.S.C. § 1983** plaintiff were "pre-textual" or "mixed motive" in nature when:
   (a) the aforementioned claims were set forth in the plaintiff's Second Amended Complaint (D.Ct. Doc. 43);
   (b) a request for jury trial was made (D.Ct. Doc. 2; Appendix hereto at p. 124);
   (c) Glenna Burre gave direct testimony that she verbally informed the **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) of actions made toward her by Charles Ausfahl that she deemed to be sexual

in nature (Hearing Transcript, Vol. I, pp. 234-235);

(d) Glenna Burre gave direct testimony that she filed a formal sexual harassment complaint against Charles Ausfahl (Hearing Transcript, Vol. I, pp. 234-235);

(e) the **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) gave direct testimony that Glenna Burre made a sexual harassment complaint to him concerning Charles Ausfahl and that he (Petitioner Hopkins) took immediate action in discussing the matter with Charles Ausfahl and reported the complaint and the action taken to his (Petitioner Hopkins) supervisor, Kyle Vickers (Hearing Transcript, Vol. II, pp. 290-292);

(f) Kyle Vickers gave direct testimony that he recommended that the **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) be fired (Hearing Transcript, Vol. I, pp. 120-121);

(g) Kyle Vickers gave direct testimony that the firing was his idea originally and that the **42 U.S.C. § 1983** plaintiff's (Petitioner Hopkins) handling of the sexual harassment complaint was a factor in his recommendation to fire Hopkins (Hearing Transcript, Vol. I, pp. 120-121);

(h) **42 U.S.C. Section 2000e-3(a)** states in pertinent part that:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . ., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

(i) **Missouri Revised Statutes: Chapter 105: Section 105.055.2.** states in pertinent part that:

"No supervisor or appointing authority of any state agency shall:
(1) Prohibit a state employee from or take any disciplinary action whatsoever against a state employee for the disclosure of any alleged prohibited activity under investigation or any related activity, or for the disclosure of information which the employee reasonably believes evidences:
(a) A violation of any law, rule or regulation;
* * * * * *
4. As used in this section, "disciplinary action" means any dismissal, demotion, transfer, reassignment, suspension, reprimand, warning of possible dismissal or withholding of work, whether or not the withholding of work has affected or will affect the employee's compensation."

4. Whether the court below was in error in making the determination that a **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) waived his First Amendment claim that he was denied freedom of speech, waived his Fourteenth Amendment claim that he was denied equal protection under the law (**42 U.S.C. Section 2000e-3(a)** and **Missouri Revised Statutes: Chapter 105: Section 105.055.2.**) even though there was direct testimony to support those claims and the **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) brought these unresolved claims to the trial court's attention on several occasions.

5. Whether the State of Missouri and the Missouri Department of Agriculture waived Eleventh Amendment immunity to suit in federal court when the agencies voluntarily chose to apply for designation as an official grain inspection agency under the **United States Grain Standards Act. (7 U.S.C. Section 71, et seq.)**

6. Whether the court below—so as to avoid clear error and to prevent manifest injustice—should have reconsidered their "law of the case" relating to the State of Missouri's and the Missouri Department of Agriculture's Eleventh Amendment immunity as an official designated inspection agency under the **United States Grain Standards Act. (7 U.S.C. Section 71, et seq.)**

7. Whether the court below was in error in denying the trial court's award of nominal damages to a **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) when that court made the determination that the award of nominal damages in the instant case are "legal" in nature rather than "equitable."

8. Whether the court below was in error in denying the trial court's award of attorney's fees to a **42 U.S.C. § 1983** plaintiff (Petitioner Hopkins) because without an award of at least "nominal damages" then the plaintiff (Petitioner Hopkins) is not a "prevailing party."

9. Whether the courts below were in error for denying the plaintiff's (Petitioner Hopkins) unopposed motion for a new hearing because the defense violated the trial court's order that witnesses not discuss their testimony and because one witness was allowed to remain in the courtroom throughout the entirety of the hearing—under objection by plaintiff's (Petitioner Hopkins) attorney.

10. Whether the courts below were in error for denying plaintiff's (Petitioner Hopkins) motion for a hearing whereby plaintiff (Petitioner Hopkins) could place into evidence information regarding the mental and emotional distress he suffered from being terminated without notice and a pre-termination hearing.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

JOHN L. SAUNDERS, individually and in his official capacity as the Director of the Missouri Department of Agriculture of the State of Missouri;

KYLE VICKERS, individually and in his official capacity as the Deputy Director of the Missouri Department of Agriculture of the State of Missouri;

CHARLES AUSFAHL, individually and in his official capacity as an employee of the Missouri Department of Agriculture of the State of Missouri;

ROY TEMPLE, individually and in his official capacity as the Deputy Chief of Staff and aide to the Governor of the State of Missouri; and

BETH M. WHEELER, individually and in her official capacity as the designated member of the Governor's staff as having supervisory authority over the Missouri Department of Agriculture.

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OPINIONS AND ORDERS IN THE COURTS BELOW

The December 16, 1999 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is sought to be reviewed, is reported at Hopkins v. Saunders, 199 F.3d 968 (8th Cir. 12/16/1999) (*Hopkins II*), and is reprinted in the Appendix to this Petition at pp. 2-21.

The January 26, 2000 order of the Court of Appeals for the Eighth Circuit, denying rehearing is unreported and is reprinted in the Appendix to this Petition at p. 1.

The prior opinion of the United States District Court for the Western District of Missouri, entered June 16, 1998, in Case No.94-4458-CV-C-SOW, is unpublished, and is reprinted in the Appendix to this Petition at pp. 22-23.

The prior opinion of the United States District Court for the Western District of Missouri, entered April 22, 1998, in Case No.94-4458-CV-C-SOW, is unpublished, and is reprinted in the Appendix to this Petition at pp. 24-25.

The prior judgment of the United States District Court for the Western District of Missouri entered on February 27, 1998 in Case No.94-4458-CV-C-SOW, is unpublished, and is reprinted in the Appendix to this Petition at pp. 26-30.

The prior order of the United States District Court for the Western District of Missouri, entered November 7, 1997 in Case No.94-4458-CV-C-SOW, is unpublished, and is reprinted in the Appendix to this Petition at p. 31.

The prior order of the United States District Court for the Western District of Missouri, entered September 30, 1997 in Case No.94-4458-CV-C-SOW, is unpublished, and is reprinted in the Appendix to this Petition at pp. 32-40.

The January 23, 1996 order of the Court of Appeals for the Eighth Circuit, denying rehearing is unreported and is reprinted in the Appendix to this Petition at p. 41.

The August 23, 1996 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is sought to be reviewed, is reported at Hopkins v. Saunders, 93 F.3d 522 (8th Cir. 1996) (*Hopkins I*), and is reprinted in the Appendix to this Petition at pp. 42-51.

The prior order of the United States District Court for the Western District of Missouri, entered January 9, 1996 in Case No.94-4458-CV-C-5, is unpublished, and is reprinted in the Appendix to this Petition at pp. 52-78.

The prior judgment of the Circuit Court of Cole County, Missouri entered on May 4, 1995 in Case No. CV-194-1028CC, is unpublished, and is reprinted in the Appendix to this Petition at pp. 79-80.

The prior order of the Personnel Advisory Board of the State of Missouri entered on October 18, 1994 in Case No. NM95-001, is unpublished, and is reprinted in the Appendix to this Petition at pp. 81-84.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 16, 1999. The order of the Court of Appeals denying rehearing was entered on January 26, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

U.S. Constitution: First Amendment: Article I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Missouri Constitution: Article I: Section 8.

"That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts."

U.S. Constitution: Fifth Amendment: Article V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ."

Missouri Constitution: Article I: Section 10.

"That no person shall be deprived of life, liberty or property without due process of law."

U.S. Constitution: Eleventh Amendment. Article XI.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

States by citizens of another state, or by citizens or subjects of any foreign state."

U.S. Constitution: Fourteenth Amendment: Article XIV.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Missouri Constitution: Article I: Section 2.

"That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design."

28 U.S.C. Sec. 1738.

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of

a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

42 U.S.C. Sec. 1983.
Text is reprinted in Appendix to this Petition at pp. 92-93.

42 U.S.C. Sec. 1988.
Text is reprinted in Appendix to this Petition at pp. 93-94.

42 U.S.C. Sec. 2000e.
Text is reprinted in Appendix to this Petition at pp. 94-96.

42 U.S.C. Sec. 2000e-2.
Text is reprinted in Appendix to this Petition at p. 96.

42 U.S.C. Sec. 2000e-3.

"Other unlawful employment practices.

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings—

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an

unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

7 U.S.C. Sec. 74.
Text is reprinted in Appendix to this Petition at p. 86.

7 U.S.C. Sec. 79.
Text is reprinted in Appendix to this Petition at pp. 86-90.

7 U.S.C. Sec. 84.(g).
Text is reprinted in Appendix to this Petition at p. 90.

7 U.S.C. Sec. 87f. (h).

"District court jurisdiction. The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories and possessions of the United States shall have jurisdiction in cases arising under this chapter."

7 CFR Sec. 800.0.
Text is reprinted in Appendix to this Petition at pp. 98-101.

7 CFR Sec. 800.1.
Text is reprinted in Appendix to this Petition at p. 101.

7 CFR Sec. 800.196.
Text is reprinted in Appendix to this Petition at pp. 101-106.

Missouri Revised Statutes: Chapter 411: Section 411.145.

"The Missouri department of agriculture is hereby authorized to conduct official grain inspection business outside the boundaries of the state of Missouri; provided that, such business:

(1) Is conducted in a manner that is consistent with the provisions of this chapter concerning the providing of official grain inspection and weighing services;
(2) Is in compliance with the rules and regulations promulgated by the Federal Grain Inspection Service in regard to providing official inspection and weighing services; and
(3) Any expenditures involved are in compliance with the state of Missouri's budget process and the office of administration's rules, regulations and guidelines."

Missouri Revised Statutes: Chapter 36: Section 36.030.
Text is reprinted in Appendix to this Petition at pp. 108-110.

Missouri Revised Statutes: Chapter 36: Section 36.031.
Text is reprinted in Appendix to this Petition at pp. 110-111.

Missouri Revised Statutes: Chapter 36: Section 36.350.
Text is reprinted in Appendix to this Petition at pp. 111-112.

Missouri Revised Statutes: Chapter 36: Section 36.380.

"An appointing authority may dismiss for cause any employee in his division occupying a position subject hereto when he considers that such action is required in the interests of efficient administration and that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the appointing authority gives to such employee a written statement setting forth in substance the reason therefor and files a copy of such statement with the director. When it is not practicable to give the notice of dismissal to an employee in person, it may be sent to the employee by certified or registered mail, return receipt requested, at his last mailing address as shown

in the personnel records of the appointing authority. Proof of refusal of the employee to accept delivery or the inability of postal authorities to deliver such mail shall be accepted as evidence that the required notice of dismissal has been given. If the director determines that the statement of reasons for the dismissal given by the appointing authority shows that such dismissal does not reflect discredit on the character or conduct of the employee, he may, upon request of the employee, approve reemployment under section 36.240, in any class in which the employee has held regular status. Any regular employee who is dismissed shall have the right to appeal to the board as provided under section 36.390."

Missouri Revised Statutes: Chapter 36: Section 36.390.5. Text is reprinted in Appendix to this Petition at pp. 113-114.

Missouri Revised Statutes: Chapter 105: Section 105.055. Text is reprinted in Appendix to this Petition at pp. 115-116.

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VI (1)(A).

"Demotions in, and dismissals from, employment shall be made for cause under rules uniformly applicable to all positions of employment. No appointment, promotion, demotion, or dismissal shall be made because of favoritism, prejudice or discrimination."

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VI (2)(A).

"Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline, or any other aspect of personnel administration, because of political or religious

opinions or affiliations or because of race, national origin, or any other non-merit factors is prohibited."

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VI (2)(B).

"An applicant or employee who feels himself adversely affected in his opportunity for employment, in his status as an employee, or in his condition of employment because of discrimination may under this rule appeal to the board for a review of the alledged (sic) discriminatory action or practice."

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number VIII(5).

"Dismissals – The director may dismiss for cause any employee in his division occupying a position subject to the classified service when he considers that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the director gives to the employee a written statement setting forth in substance the reason therefor and files a copy of the statement with the board. If the board determines that the statement of reasons for the dismissal given by the director shows that the dismissal does not reflect discredit on the character or conduct of the employee, they may upon request of the employee, approve reemployment eligibility in an appropriate class or classes. Any regular employee who is dismissed shall have the right to appeal to the board as provided in these rules."

Merit System Rules and Regulations for the Division of Grain Inspection: Rule Number XIV.

Text is reprinted in Appendix to this Petition at pp. 119-120.

STATEMENT OF THE CASE

Petitioner Tommy D. Hopkins, a long-time employee of the Division of Grain Inspection and Warehousing (the Grain Division) of the Missouri Department of Agriculture (the Department), brought a civil action in the U.S. District Court for the Western District of Missouri, seeking relief under **7 U.S.C. § 71, *et seq.*, 42 U.S.C. §§ 1983, 1985(3), 1988 and 2000e-3(a), Article I, §§ 2, 8 and 10 of the Missouri Constitution**, and **§ 105.055, RSMO**. Petitioner requested a jury trial. (D.Ct. Doc. 2; Appendix hereto at p. 124).

Following an order from the U.S. District Court for the Western District of Missouri denying in large part respondents' dispositive motion, respondents took an interlocutory appeal to the U.S. Court of Appeals for the Eighth Circuit, which resulted in a published opinion, **Hopkins v. Saunders, 93 F.3d 522 (8th Cir. 1996). (*Hopkins I*)**. The case was remanded to the district court for further proceedings.

On remand, the district court found by way of cross motions for summary judgment that petitioner had a property interest in his job as Director of the Grain Division of the Missouri Department of Agriculture. Upon a bench hearing, the district court found that petitioner would have been dismissed from his position even if his due process rights had not been violated, and awarded petitioner nominal damages, attorney's fees and entered final judgment on all petitioner's claims. Petitioner's post-trial motions were denied.

Petitioner appealed the district court's denial of his claim for reinstatement and from the court's failure to rule on his claims that respondents violated his rights under the **First Amendment**, the **Fourteenth Amendment**, **42 U.S.C. §§ 2000e-3(a)** and **§105.055, RSMO**.

The respondents cross-appealed, contending that the district court committed error in finding that petitioner had a property interest in his job and in awarding petitioner nominal damages and attorney fees which resulted in a published opinion, **Hopkins v. Saunders, 199 F.3d 968 (8th Cir. 1999) (*Hopkins II*).**

In ***Hopkins II***, the panel found that petitioner was dismissed from his position as director of the Grain Division of the Department without receiving prior notice or a hearing. The panel found that petitioner had a protected property right interest in his position as director of the Grain Division. The panel found that petitioner had never received a post termination hearing from the respondents. The panel found that petitioner had adequately pled his **First Amendment** and **42 U.S.C. §§ 2000e-3(a)** claims but he had waived these claims because he had failed to adequately assert them to the district court.

Furthermore, the panel vacated the district court's award of nominal damages by finding that in the instant case that an award of nominal damages is legal in nature and therefore barred by the immunity findings in ***Hopkins I***. The panel vacated petitioner's attorney fee award on a finding that absent the nominal damage award a "declaration that his procedural due process rights were violated" is not sufficient to confer prevailing party status. The panel found that federal law is determinative of what process is due and that State (of Missouri) law is irrelevant. The panel ruled against petitioner in all other matters.

The jurisdiction for the Court of Appeals for the Eighth Circuit is based on **28 U.S.C. §1291**, which provides for jurisdiction over a final judgment from a U.S. District Court.

REASONS FOR GRANTING THE WRIT

I.

Under Missouri case law, when an employee has established that he or she is entitled to due process protections, as Petitioner has done here, and when an employee's dismissal has been found to be in violation of due process safeguards, as has been found here, the dismissed employee is entitled—without further hearing—to immediate reinstatement and back pay to the date of the invalid dismissal. In *Hopkins II*, the panel declared that State (of Missouri) law is "irrelevant" in determining what process is due.

Neither the panel decision in ***Hopkins I*** nor the panel decision in ***Hopkins II*** pays any attention to, or gives credence to, Missouri case law that requires that a public employee who has not been given adequate, specific notice of the grounds for suspension or dismissal is entitled to reinstatement and back pay retroactive to the date of suspension or dismissal. **Division of Family Services v. Cade, 939 S.W.2d 546 (Mo.App.W.D. 1997); Wolf v. Missouri State Training School for Boys, 517 S.W.2d 138 (Mo.banc 1974); Edwards v. Schoemel, 765 S.W.2d 607 (Mo.banc 1989).**

In **Wolf**, 517 S.W.2d at p. 142, the Missouri Supreme Court held that, where the dismissal notice required by statute was not properly given, "the discharge of respondent [employee Wolf] **did not take effect."** (emphasis added) Likewise, in **Cade**, 939 S.W.2d at p. 555-56, an employee who was suspended without proper notice was entitled to reinstatement and back pay. See, also, **Edwards v. Schoemel**, 765 S.W.2d at p. 610 and **Hamby v. City of Liberty, Case #56352 (Mo.App. WD 08/30/1999).**

The panel decision in ***Hopkins II*** held that Petitioner Hopkins had a property interest, or legitimate claim of entitlement, in continued employment unless dismissed for cause. The record is replete with admissions and findings that Petitioner Hopkins was never presented with any grounds whatsoever for his dismissal prior to his being dismissed. Additionally, as admitted by the panel in ***Hopkins II*** the record is void of any document being introduced as evidence to the District Court that sets forth the specific reason(s) Petitioner Hopkins was dismissed.

In **Cleveland Board of Education v. Loudermill, 470 U.S. 532, 543, 105 S.Ct. 1487, 1494, 84 L.Ed.2d 494 (1985)**, the Supreme Court noted the importance of depriving a person of pay, stating it had previously recognized "the severity of depriving a person of the means of livelihood." **Loudermill** premised the requirement of a pre-termination hearing on the Supreme Court's recognition that a public employee's interest in retaining his job until given an opportunity to contest the reasons for his dismissal outweighs the governmental interest in immediate termination of unsatisfactory employees and avoidance of administrative burdens. **Id.** at 542-45. The Court noted that a pre-termination hearing may be the employee's sole meaningful opportunity to invoke the decision maker's discretion in cases where the facts are clear but the propriety of the dismissal may not be. **Id.** at 543. The Court stated unequivocally that:

> "It is preferable to keep a qualified employee on than to train a new one. A governmental employer has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counter-productive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." **Id.** at 544-45 (footnote omitted).

In **Loudermill**, the Court thus held that due process entitles a tenured public employee, at a minimum, to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before termination. **Id.** at 546. Although the Court did not require a full evidentiary hearing and a definitive resolution of the propriety of the discharge prior to termination, it based this portion of its holding on the availability under state law of a full post-termination administrative hearing and judicial review. See **id**. at 545-48. The Court thus contemplated that an employee with a constitutionally protected property interest in his job would receive both an opportunity to respond to charges against him before cessation of his pay and a reasonably prompt post-termination hearing on the merits of his dismissal.

In the instant case, Petitioner Hopkins was fired by the Missouri Department of Agriculture six years ago. The Respondents steadfastly refused to accord Petitioner a hearing of any kind as to the reasons for his dismissal. Petitioner has been deprived of his career as an Agriculture Department employee and has been forced to seek other less remunerative and less secure employment. Petitioner never received a pre-termination notice nor was he accorded a pre-termination hearing and he fought for over four years to obtain any type of post-termination hearing. Even at the hearing before the trial court the Respondents failed to place before the trier of fact a notice—a "bill of particulars"—specifically setting forth why the Petitioner was terminated. Petitioner is entitled by law to receive back pay to the date of his improper dismissal and continuing to the date of any proper dismissal made in accordance with due process. **Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976).**

The Merit System Plan adopted by the Department of Agriculture pursuant to the Governor's Executive Order of February 1, 1978, provided:

> **"No dismissal of a regular employee shall take effect unless, prior to the effective date thereof,** the director gives to the employee a written statement setting forth in substance the reason therefor and files a copy of the statement with the board." (emphasis added) (Portion of Ex. 5 to D.Ct. Doc. 98)

It is well established that state agencies must comply with their own internal procedures. "It is essential in our system of justice that statutes and regulations are followed punctiliously." **McKenna v. Personnel Advisory Board, 702 S.W.2d 548, 554[12] (Mo.App.W.D. 1985).** See **Derrickson v. Board of Education, 703 F.2d 309, 315 (8th Cir. 1983); Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270 (1974).** "It is a familiar rule of administrative law that an agency must abide by its own regulations." **Fort Stewart Schools v. Federal Labor Relations Authority, 495 U.S. 641, 110 S.Ct. 2043, 2051, 109 L.Ed.2d 659 (1990).**

Based on the fact that Petitioner Hopkins was fired without the required notice and without a hearing, under Missouri case law his dismissal never took effect. Therefore, Missouri case law requires that Petitioner Hopkins be reinstated to his position forthwith.

Petitioner Hopkins is entitled to be paid his back pay from June 10, 1994, until he is properly dismissed (if he is ever, indeed to be dismissed) in accordance with due process safeguards and in compliance with state law, rules and

regulations, and the Department of Agriculture's Merit System Plan.

In **Wolf**, the Missouri Supreme Court ruled that the employee was entitled to back pay to the date of the improper dismissal, subject to reduction by such amount(s) as the employee earned or could have earned during the period he was deprived of his employment. **Wolf, 517 S.W.2d at pp. 144-145.** In **McKenna**, the dismissed employees were reinstated with back pay. **McKenna, 702 S.W.2d at p. 550.** Likewise, the suspended employees in **Cade** and **Edwards** were reinstated with back pay. **Cade, 939 S.W.2d at p. 555; Edwards, 765 S.W.2d at p. 610.**

II.

The Eighth Circuit panel decisions in both *Hopkins I* and *Hopkins II* overlooks the fact that the State of Missouri waived both its Eleventh Amendment protection and its sovereign immunity by seeking and obtaining designation as an official inspection and weighing agency under the U.S. Grain Standards Act.

Neither panel decision discusses the issue of whether the State of Missouri waived its **Eleventh Amendment** immunity, its sovereign immunity and the qualified immunity of its officials when it first entered into the Designation Agreement with the U. S. Department of Agriculture for designation as an official inspection agency and when it renewed its Designation Agreement every three years thereafter. Therefore, the panel decisions have overlooked an important and decisive issue of law.

Absent consent, waiver or abrogation, it is true that the **Eleventh Amendment** provides immunity to the States and their agencies and officials from damage suits in the federal courts. **Edelman v. Jordan, 415 U.S. 651, 94 S.Ct.**

1347, 1355[3], 39 L.Ed.2d 662 (1974). However, the law is also clear that a State may waive its immunities from suit, and that of its employees, and thus sovereign immunity and **Eleventh Amendment** immunity are not defenses.

The United States Supreme Court, in **Parden v. Terminal Railway of the Alabama State Docks Department, 377 U.S. 184, 84 S.Ct. 1207 (1963),** held that the State of Alabama could be sued for damages under the Federal Employers' Liability Act (FELA) for injuries suffered by workers working for a state-owned railroad, because the State had waived its immunity to monetary damages by operating the state-owned railroad. By operating the railroad, the Court said, the State of Alabama had "necessarily consented" to any suits authorized by law. The Court noted that a State's immunity from suit has been well-recognized, but further stated that "when a State leaves the sphere that is exclusively its own and [voluntarily] enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." **Parden at 84 S.Ct. 1215[15].**

It has long been established that, when a governmental entity engages in business in competition with private enterprise, "it divests itself...of its sovereign character, and takes that of a private citizen." **Bank of the United States v. Planters' Bank of Georgia, 9 Wheat. 904, 907, 6 L.Ed. 244 (1824),** quoted in **Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 582, 96 S.Ct. 1854, 1862, 48 L.Ed.2d 301 (1976).**

In the instant case, both the panel decision in ***Hopkins I*** and the panel decision in ***Hopkins II*** overlook the fact that the State of Missouri "necessarily consented" to suit when it sought and obtained designation to perform the services of an officially licensed grain inspection and weighing agency, an activity that the State carries on for payment of fees and the

earning of profits for the Grain Inspection Fee Fund. Just like the State of Alabama operating a state-owned railroad, the State of Missouri voluntarily entered into the area of grain inspection and weighing, and thereby waived its immunities and subjected itself and its employees to the federal laws and regulations of the federalized grain inspection and weighing program. The State of Missouri ***on at least three occasions***, voluntarily entered into agreements with the U. S. Department of Agriculture and FGIS to provide various inspection, weighing and commodity-related services, all of which were under the umbrella of the federal Grain Standards Act and regulations promulgated pursuant thereto.

The United States Grain Sttandards Act states in pertinent part that:

> "District court jurisdiction. The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories and possessions of the United States shall have jurisdiction in cases arising under this chapter." **(7 U.S.C. Sec. 87f. (h)).**

Both panel decisions in this case are directly contrary to the rule established by the Court of Appeals of the Eighth Circuit in **Barnes v. State of Missouri, 960 F.2d 63, 65[6] (8th Cir. 1992)**, in which the Eighth Circuit held that a State may waive its sovereign immunity to suit in federal court where the waiver is made by the express language of the statute or "by such overwhelming implications from the text as will leave no room for any other reasonable construction."

In the instant case, the Eighth Circuit appears to overlook the fact that the State of Missouri repeatedly waived its freedom from suit in the federal courts by entering into designation agreements with the U. S. Department of

Agriculture and thereby subjecting itself to the same regulations and lawsuits that would apply to private businesses and individuals operating designated inspection and weighing agencies. The Eighth Circuit 's decisions are also contrary to the decision of the United States Supreme Court in **Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124[16] (1996)**, where the Court stated that the language of a federal statute may "make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit." And, because the State of Missouri has waived its immunities, the individual Respondents are not entitled to immunity, because the only immunities available to them are the immunities that the governmental entity possesses. **Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358, 362[2] (1991).**

III.

The Eighth Circuit panel decisions in both *Hopkins I* and *Hopkins II* erroneously holds that the Respondents are entitled to Eleventh Amendment immunity from monetary damages. The decision overlooks the decision of the Missouri Court of Appeals in Dixon v. Holden, 923 S.W.2d 370 (Mo.App.W.D. 1996), holding that the State Legal Expense Fund, Sections 105.711-726, RSMo 1994, is available to compensate persons for violations of their civil rights under 42 U.S.C. Sec. 1983 and that sovereign immunity is therefore not a defense.

Both panel decisions hold that the Respondents are entitled to Eleventh Amendment immunity because any monetary award entered against them would be paid from the Grain Inspection Fee Fund established pursuant to **Section 411.151, RSMO**, and that fund is a part of the state treasury, is restricted by state and federal law, and cannot be expended without legislative appropriation.

However, the panel decisions overlook the decision of the Missouri Court of Appeals in **Dixon v. Holden**, **923 S.W.2d 370 (Mo.App.W.D. 1996)**, in which the Missouri Court of Appeals held that the State has waived its sovereign immunity from suit for damages to the extent it has provided funds for the defense of lawsuits and payment of judgments under the **State Legal Expense Fund, Secs. 105.711-726, RSMO 1994**. In the **Dixon** case, a former State Highway Patrol trooper sued two superior officers in federal court under **42 U.S.C. Sec. 1983** for violating his constitutional rights (just as Petitioner Hopkins has done in the instant case). Eventually, Dixon obtained a judgment in the federal court (based on a settlement) against his superior officers in the amount of $225,000.00. The State Treasurer and the Commissioner of Administration refused to pay the judgment and Dixon brought suit in the state court to compel payment of the judgment from the State Legal Expense Fund. The circuit court and then the Court of Appeals ordered that the judgment be paid from the Fund.

The Missouri Court of Appeals ruled that the language of **Sec. 105.711.2, RSMO** providing that money in the Fund "shall be available for the payment of any claim or any amount of any final judgment rendered by a court of competent jurisdiction against...[a]ny employee...upon conduct of such employee arising out of and performed in connection with his or her official duties on behalf of the state..." covers a suit filed under **42 U.S.C. Sec. 1983**.

In the instant case, there is no dispute that the Respondents were acting on behalf of the State and in their employment for the State when they summarily terminated Petitioner Hopkins from his job as Division Director. The Missouri Court of Appeals opinion in **Dixon** leaves no room for argument that the money in the Legal Expense Fund would be available to pay any judgment which Petitioner

Hopkins might obtain against the Respondents. In the **Dixon** case, the State Treasurer and Commissioner of Administration argued, as have the Respondents here, that the suit against them violates sovereign immunity. The Missouri Court of Appeals rejected this argument and held that the Fund is merely a voluntary assumption of defense and payment of judgments or claims against state employees sued for their conduct arising out of and performed in connection with their official duties on behalf of the State, and therefore the doctrine of sovereign immunity is not even an issue. As for the defendants' argument that the federal suit violated the State's **Eleventh Amendment** immunity, the Court of Appeals rejected the argument without discussion, citing **Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), *cert denied*, 464 U.S. 932 (1983).** **Dixon** holds that the State Legal Expense Fund is funded by legislative appropriations, from which the Commissioner of Administration may self-insure or may purchase insurance coverage.

Neither panel decision accords a discussion to this holding of the Missouri Courts. Even if the Eighth Circuit is correct that the Respondents herein are entitled to immunity because the Grain Inspection Fee Fund is a part of the state treasury, it is clearly and well-established that the State of Missouri has voluntarily agreed by statute to defend lawsuits filed against state employees and to pay the judgments entered against those employees. (It is worthy of note that the Respondents herein are being defended by the State Attorney General, just as were the defendants in the **Dixon** case.)

Therefore, the Defendants in the instant case are not entitled to claim Eleventh Amendment immunity, because the State of Missouri has expressly agreed to defend them and to pay any judgment against them, pursuant to **Sections 105.711-726, RSMO**.

Neither panel decision accords a discussion to the holding of the Missouri Court of Appeals in **Dixon** where it was held that the State has waived its sovereign immunity from suit for damages to the extent it has provided funds for the defense of lawsuits and payment of judgments under the **State Legal Expense Fund, Secs. 105.711-726, RSMO 1994**, and the State Legal Expense Fund is funded by legislative appropriations, from which the Commissioner of Administration may self-insure or may purchase insurance coverage.

IV.

Petitioner Hopkins is entitled to an award of at least nominal damages for violation of his due process rights and is entitled to an award of attorneys' fees as the prevailing party.

In ***Hopkins II*** the panel was in error when it denied Petitioner Hopkins an award of at least nominal damages and denied him prevailing party attorney fees. Petitioner Hopkins is entitled to an award of at least nominal damages for the Respondents' violation of Petitioner Hopkins' constitutional due process rights, because of the admitted failure to give Petitioner Hopkins notice of the reasons for his termination and failure to accord him any hearing at all to establish cause for his termination. Secondly, Petitioner Hopkins is entitled to an award of reasonable attorneys' fees because Petitioner Hopkins is the prevailing party on the due process issue, an important constitutional right, and because Petitioner Hopkins should have judgment that vindicates Petitioner Hopkins' rights, secures an important right to the public, and alters the legal relationship between the parties.

It is well-established that a plaintiff is entitled to an award of at least nominal damages whenever he or she has established an absolute right to procedural due process and

demonstrates that his or her rights to procedural due process have been violated. Petitioner Hopkins has done so in this case.

The basic purpose of a damages award in a §1983 action is to compensate persons for injuries caused by the deprivation of constitutional rights. **Carey v. Piphus, 435 U.S. 247, 254, 98 S.Ct. 1042, 1054[6], 55 L.Ed.2d 252 (1978):**

> "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed (citations omitted) . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury."

The Eighth Circuit has followed this rule in **Hogue v. Clinton, 791 F.2d 1318, 1323, (8th Cir.), cert. denied, 479 U.S. 1008, 93 L.Ed.2d 704, 107 S.Ct. 648 (1986).**

In the instant case, both the trial court and the Eighth Circuit panel has held that Petitioner Hopkins has established that he had a property interest in his continued employment and that the Respondents (some or all) violated his due process rights by failing to give him the notice and hearing required by the 1978 merit system plan established pursuant to the Governor's Executive Order.

Petitioner Hopkins has been precluded from establishing and recovering any compensatory or punitive damages from the Respondents because the Court of Appeals found that the Respondents were protected by sovereign immunity. **Hopkins v. Saunders, 93 F.3d 522 (8th Cir. 1996).** However, the holding in **Carey** mandates that

Petitioner Hopkins be awarded at least nominal damages for the due process violations.

42 U.S.C. §1988 provides that a district court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." A plaintiff is a prevailing party if he or she succeeds "on **any** significant issue . . . which achieves **some** of the benefit the parties sought in bringing suit." (emphasis added) **Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 1939, 76 L.Ed2d 40 (1983).** It is not necessary that a plaintiff succeed on all of the significant issues, or that the court award all of the benefit sought by the complaint. **Fast v. School District of City of Ladue, 728 F.2d 1030, 1033[1] (8th Cir. 1984).**

The leading current case on the awarding of attorneys' fees under §1988 appears to be **Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed2d 494 (1992).** In that case, the Supreme Court held that a plaintiff who wins even nominal damages is a prevailing party under §1988. A prevailing party is one who has obtained a judgment that alters the legal relationship between the parties and modifies the defendant's behavior in a way that directly benefits the plaintiff. Even an award of $1 in nominal damages constitutes relief on the merits, and it affects the defendant's behavior toward the plaintiff by at least forcing the defendant to do something (pay the plaintiff $1) which he would not otherwise have done. **Farrar, supra, at 506 U.S. 113.**

The primary purpose for allowing the prevailing party his or her attorneys' fees in a civil rights action is to promote diffuse private enforcement of civil rights law by allowing citizens to monitor rights violations at their source, and to impose the costs of rights violations on the violators. **Casey v. City of Cabool, 12 F.3d 799 (8th Cir. 1993).** A plaintiff bringing a civil action "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that

Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest . . . . " **Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 19L.Ed2d 1263, 88 S.Ct. 964 (1968).**

In the instant case, Petitioner Hopkins has prevailed on two important aspects of his case: (a) He has established that he was entitled to but was deprived of his constitutional right to procedural due process before being fired from his job, and (b) He obtained a hearing before the district court on the causes for his dismissal, and therefore he has obtained at least a portion of the relief he implicitly requested in Count IV of his Second Amended Complaint.

Once it is established that a party is the prevailing party, the district court has substantial discretion in determining a reasonable amount of attorneys' fees to be awarded. In her concurring opinion in **Farrar**, Justice O'Connor outlined three factors that should be considered in determining whether and how much a prevailing party should be awarded in attorney's fees:

(1) the difference between the amount recovered and the damages sought;

(2) the significance of the legal issue on which the plaintiff prevailed; and

(3) any public goal or purpose the litigation might have served.

Farrar, supra, at 506 U.S. 116-122; Jones v. Lockhart, 29 F.3d 422, 423-24 (8th Cir. 1994).

As for the first factor, in the instant case, it must be borne in mind that Plaintiff was precluded from recovering compensatory damages from the Respondents because the Eighth Circuit panel in ***Hopkins I*** overruled the trial court and found that the Respondents were protected by sovereign

immunity. Had it not been for that ruling, Petitioner Hopkins would have been permitted to adduce evidence of his actual losses and could well have recovered for those losses, including not only six years of lost pay at $60,000-plus per year, lost retirement benefits, but also medical costs and other consequential losses.

The second factor is entitled to much greater weight. Both the trial court and the panel decision in ***Hopkins II*** found that the Respondents denied Petitioner Hopkins his procedural due process rights. In fact, the Respondents have admitted that they denied Petitioner Hopkins the hearing and notice required by the 1978 merit system plan, on the basis that Petitioner Hopkins was not covered by the 1978 Plan and was therefore not entitled to such procedural protections. However, the Missouri Personnel Advisory Board (Appendix hereto at pp. 81-84), affirmed by the Cole County Circuit Court (Appendix hereto at pp. 79-80), found that Petitioner Hopkins was, indeed, covered by the 1978 merit plan. Likewise, both the trial court and the panel decision in ***Hopkins II*** found that Petitioner Hopkins had a property interest in continued employment because of his inclusion under the umbrella of the 1978 Plan.

Thus, Petitioner Hopkins has been vindicated on the most important facet of this litigation—the deprivation of his right to due process. This Court in **Farrar** described the right to due process as "absolute," and said that an award of nominal damages to remedy its deprivation "recognizes the importance to organized society that [this] righ[t] be scrupulously observed." **Farrar, supra, 506 U.S. at 112, quoting Carey v. Piphus at 436 U.S. 266.**

With respect to the third factor, Petitioner Hopkins has prevailed in another very important respect in that the result herein will serve to deter Respondents and other public officials from depriving other public employers of their due

process rights. The trial court's holding and the panel decision in ***Hopkins II*** that the Respondents herein have deprived Petitioner Hopkins of his property right to continued employment without due process of law is an important vindication of constitutional rights. "When public officials violate the rights of citizens, and courts so declare, an important deterrent effect results. Other public officials are less likely to violate other citizens' rights in the future." **Fast v. School District of City of Ladue, 728 F.2d at 1030 (8th Cir. 1984).**

Another factor that should be considered by the Court is the complexity of the case and the issues. The trial court was in a unique position to assess the complexity of the case and to determine the reasonableness of counsel's fees, and this is why the trial court is given broad discretion to determine the amount of fees to be awarded. **Parton v. GTE North, Incorporated, 971 F.2d 150 (8th Cir. 1992).** The instant case has involved rather complicated and extensive factual issues and disputes, as well as the hotly contested issue of the Respondents' sovereign immunity. Numerous extensive briefs have been filed with the trial court on these issues, and this case has twice gone to the Eighth Circuit Court of Appeals. Accordingly, this is an important factor weighing in favor of awarding Petitioner Hopkins his attorneys' fees.

Finally, it should be noted that many of these fees and expenses could have been avoided had the Respondents and the State of Missouri accorded Petitioner Hopkins the procedural due process to which he was entitled in the first place. The fees and expenses incurred were incurred because the State and the Respondents violated Petitioner Hopkins' due process rights by firing him without notice, without reasons being given, and without a hearing. These problems could have been rectified, for the most part, over six years ago if the Respondents had acknowledged Petitioner

Hopkins' rights under the 1978 Executive Order and Merit Plan and accorded him at least a post-termination hearing. The Petitioners, however, chose to litigate, even though it was clear on the surface that Petitioner Hopkins' rights had been violated.

CONCLUSION

In ***Hopkins II***, the panel declared that State (of Missouri) law is "irrelevant" in determining what process is due to a tenured, Missouri public employee that can only be dismissed for cause. What role does a State's (Missouri) case law play when that employee is discharged without notice, without a pre-termination hearing and without having a post-termination hearing being given within a meaningful time frame. This case provides this Court with an excellent opportunity to set forth the proper elements, procedures and remedies for violation of due process rights and the role that State law does or does not have in determining what process is due. In other words "how absolute" is this type of employee's right to receive due process.

This case provides this Court with an excellent opportunity to set forth to what extent public agencies are required to follow their own internal procedures in the dismissal of their employees. The panel decision in ***Hopkins II*** seems to be contrary to the following holdings. "It is essential in our system of justice that statutes and regulations are followed punctiliously." **McKenna v. Personnel Advisory Board, 702 S.W.2d 548, 554[12] (Mo.App.W.D. 1985).** See **Derrickson v. Board of Education, 703 F.2d 309, 315 (8th Cir. 1983); Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270 (1974).** "It is a familiar rule of administrative law that an agency must abide by its own regulations." **Fort Stewart Schools v. Federal**

Labor Relations Authority, 495 U.S. 641, 110 S.Ct. 2043, 2051, 109 L.Ed.2d 659 (1990).

The judgment of the United States Court of Appeals for the Eighth Circuit should be reviewed by this Court because the Eighth Circuit has overlooked critical and decisive issues of law and has failed to apply clearly established law by holding that the State of Missouri and the Respondents are entitled to qualified and Eleventh Amendment immunity. As set out in the above, the panel decisions in ***Hopkins I*** and ***Hopkins II*** are in conflict with previous decisions of the Eighth Circuit and of this Court on this highly sensitive Constitutional question. The law requires the Court holding that the State of Missouri waived its immunities and subjected itself to suit just like any other party when it sought and received designation as an officially designated inspection and weighing agency under the **U. S. Grain Standards Act. 7 U.S.C. 71 et. seq**. This case provides this Court with an excellent opportunity to further refine when a state waives its Eleventh Amendment protection. Review of this important issue will allow this Court to resolve the split that exists between the Circuits as to whether or not any vestiges of **Parden** remain good law.

This case provides this Court with an excellent opportunity to further refine what is a prevailing party in a due process case. The panel decision in ***Hopkins II*** seems to be contrary to this Court's holdings in **Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 1939, 76 L.Ed2d 40 (1983).**

This case provides this Court with an excellent opportunity to further refine when attorney fees are allowable in a due process case. The panel decision in ***Hopkins II*** seems to be contrary to this Court's holdings in **Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed2d 494**

(1992) and Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 19L.Ed2d 1263, 88 S.Ct. 964 (1968)..

This case provides this Court with an excellent opportunity to further refine and clarify for the Circuits what is nominal and what constitutes legal damages in a due process case.

This case provides this Court with an excellent opportunity to further refine and clarify when courts are required to make a "pre-textual" or "mixed motive" analysis as to the reasons as for a **42 U.S.C. § 1983** plaintiff's termination when:

(a) there was direct testimony that Petitioner Hopkins had a female employee report actions made toward her by her supervisor that she deemed to be sexual in nature);

(b) there was direct testimony that she filed a formal sexual harassment complaint;

(c) there was direct testimony that Petitioner Hopkins took immediate action in discussing the matter with the employee about whom the complaint was made and reported the complaint and the action taken to his (Petitioner Hopkins) supervisor (Hearing Transcript, Vol. II, pp. 290-292);

(d) there was direct testimony that Petitioner Hopkins' supervisor recommended that Petitioner Hopkins be fired (Hearing Transcript, Vol. I, pp. 120-121);

(e) there was direct testimony that the firing of Petitioner Hopkins' was the original idea of his direct supervisor and that Petitioner Hopkins handling of the sexual harassment complaint was a factor in his recommendation to fire Petitioner Hopkins (Hearing Transcript, Vol. I, pp. 120-121);

(f) **42 U.S.C. Section 2000e-3(a)** states in pertinent part that:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . ., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

(g) **Missouri Revised Statutes: Chapter 105: Section 105.055.2.** states in pertinent part that:

"No supervisor or appointing authority of any state agency shall:

(1) Prohibit a state employee from or take any disciplinary action whatsoever against a state employee for the disclosure of any alleged prohibited activity under investigation or any related activity, or for the disclosure of information which the employee reasonably believes evidences:

(a) A violation of any law, rule or regulation;

* * * * *

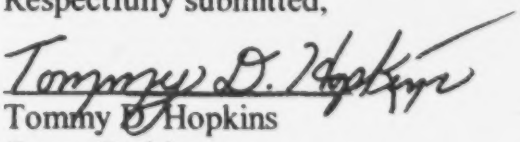
4. As used in this section, "disciplinary action" means any dismissal, demotion, transfer, reassignment, suspension, reprimand, warning of possible dismissal or withholding of work, whether or not the withholding of work has affected or will affect the employee's compensation."

In the instant case neither the trial court or the panel decision in ***Hopkins II*** addresses this direct testimony. In fact, they both totally ignore these impermissible—by both Missouri statute and Federal statute—reasons for termination. Rather, they both state that Petitioner Hopkins

was fired for cause and that is the end of the discussion. Both the trial court's decision and the panel decision in ***Hopkins II*** are in direct conflict with **42 U.S.C. Section 2000e-3(a)** and **Missouri Revised Statutes: Chapter 105: Section 105.055.2**. Also, both the trial court's decision and the panel decision in ***Hopkins II*** are in direct conflict with previous holdings of this Court as to when courts are required to make a "pre-textual" or "mixed motive" analysis as to the reasons as for a **42 U.S.C. § 1983** plaintiff's termination.

For the foregoing reasons, the Petitioner Hopkins respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,



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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

DOCKET NO. _____

In The
Supreme Court of the United States

– ♦ –

TOMMY D. HOPKINS,
Petitioner,

v.

JOHN L. SAUNDERS, KYLE VICKERS, CHARLES AUSFAHL, ROY TEMPLE AND BETH M. WHEELER,
Respondents.

– ♦ –

Petition for Writ of Certiorari
To the United States Court of
Appeals For the Eighth Circuit

– ♦ –

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

– ♦ –

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-2803WHJC

Tommy D. Hopkins,	x	
	x	
Appellant,	x	
	x	Order Denying Petition for
v.	x	Rehearing and for Rehearing
	x	En Banc
John L. Saunders, et al.,	x	
	x	
Appellees.	x	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

January 26, 2000

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-2803

Tommy D. Hopkins, *
Plaintiff/Appellant, *
*
V. *
*
John L. Saunders, Kyle Vickers, *
Charles Ausfahl, Roy Temple, *
Beth M. Wheeler, *
Defendants/Appellees. *

No. 98-2948

Appeals from the United States District Court for the Western District of Missouri.

Tommy D. Hopkins, *
Plaintiff/Appellee, *
*
V. *
*
John L. Saunders, Kyle Vickers, *
Defendants/Appellants, *
*
Charles Ausfahl, *
Defendant, *
*

Roy Temple, Beth M. Wheeler, *
Defendants/Appellants. *

Submitted: September 14, 1999

Filed: December 16, 1999

Before WOLLMAN, Chief Judge, HEANEY and BEAM, Circuit Judges.

WOLLMAN, Chief Judge.

Tommy D. Hopkins appeals from the district court's denial of his claim for reinstatement and from the court's failure to rule on his claims that John L. Saunders and other state officials (collectively, the officials) violated his rights under the First Amendment and Title VII of the Civil Rights Act of 1964 (Title VII). 42 U.S.C. §§ 2000e-2000e-17.[1] The officials cross-appeal, contending that the district court erred in finding that Hopkins had a property interest in his job and in awarding Hopkins nominal damages and attorney fees. We affirm in part and reverse in part.

I.

This case comes before us for the second time. We outline only those facts relevant to this appeal, referring the reader to a more complete recitation of the facts found in our first opinion, Hopkins v. Saunders, 93 F.3d 522, 524-25 (8th Cir. 1996) (Hopkins I). On June 10, 1994, Hopkins was

[1]We grant Hopkins' motion to supplement the record.

dismissed from his position as director of the Division of Grain Inspection and Warehousing (the Division) of the Missouri Department of Agriculture (the Department) without receiving prior notice or a hearing. Hopkins sought review of his dismissal by filing an appeal with the Agriculture Personnel Review Board (APRB), an entity formed pursuant to a merit system plan adopted by the Department in 1978 (1978 plan). The purpose of this plan and the APRB was to ensure that Division employees were employed on the basis of job qualifications rather than political affiliations. The Department responded to Hopkins' appeal with a letter explaining that the 1978 plan was void and that the APRB no longer existed.

Hopkins then filed an appeal with the Personnel Advisory Board (PAB), an employment termination review board established under Chapter 36 of the Missouri Revised Statutes. Chapter 36 is a state merit system law that was enacted by the Missouri legislature in 1979; the Department formally adopted the PAB dismissal procedures in 1982. Following a hearing, the PAB found that Missouri Revised Statute section 36.030.1(1) expressly excludes division directors, such as Hopkins, from the PAB's appeal procedures, and, furthermore, that the 1978 plan remained applicable to those employees who were excepted from the PAB's procedures. The PAB therefore dismissed Hopkins' claim, concluding that it lacked jurisdiction to hear his appeal and that the proper forum for such an appeal was the APRB.

Hopkins then brought a 42 U.S.C. § 1983 action in federal district court against Saunders, Director of the Department, and several other state officials, alleging that he was dismissed in violation of his due process rights and in violation of Missouri's whistleblower statute. The officials moved for summary judgment on qualified immunity and Eleventh Amendment immunity grounds. The district court denied the motion, whereupon the officials took an

interlocutory appeal to this court on the question of immunity. We reversed, finding that the officials were entitled to both qualified and Eleventh Amendment immunity, and remanded the case to the district court for further proceedings regarding Hopkins' claim for equitable relief. See Hopkins I, 93 F.3d at 527. On remand, the district court found by way of cross motions for summary judgment that Hopkins had a property interest in his position as Division director under the 1978 plan and that he had been dismissed in violation of his procedural due process rights. Following a hearing, the district court also found that Hopkins would have been dismissed from his position even if he had received due process. The court therefore awarded Hopkins nominal damages only, along with attorney fees, and entered a final judgment on all of Hopkins' claims.

II.

Hopkins first argues that the district court denied him the opportunity to pursue claims that he was discharged in violation of the First Amendment and Title VII.[2] He contends that these claims were sufficiently raised in his second amended complaint but were never properly resolved, inasmuch as we did not dispose of them on immunity grounds in Hopkins I and the district court failed to rule on them on remand. Thus, Hopkins contends that the district court, by entering a final judgement in Hopkins' action against the officials, wrongly foreclosed his ability to pursue these claims and that we should therefore reinstate them.

---

[2] Hopkins also contends that he was improperly foreclosed from asserting a claim based upon the Missouri Constitution's counterpart to the First Amendment. For the sake of brevity and clarity, the phrase "First Amendment" as used in this opinion refers to both Hopkins' federal and state constitutional speech claims.

Our determination whether to reinstate Hopkins' First Amendment and Title VII claims rests upon three key inquiries. First, we must determine whether Hopkins sufficiently raised First Amendment and Title VII claims in his complaint. The essential function of a complaint under the Federal Rules of Civil Procedure is to give the opposing party "fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved." Redland Ins. Co. v. Shelter Gen. Ins. Co., 121 F.3d 443, 446 (8th Cir. 1997) (citing Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 714 (8th Cir. 1979)). "[I]t is the facts well pleaded, not the theory of recovery or legal conclusions," that state a cause of action and put a party on notice. Economy Housing Co. v. Continental Forest Products, Inc., 757 F.2d 200, 203 (8th Cir. 1985) (quoting Moore v. Puget Sound Plywood Inc., 332 N.W.2d 212, 215 (1983)).

We conclude that Hopkins' second amended complaint, while not a model of clarity, alleged facts sufficient to put the officials on notice of Hopkins' First Amendment and Title VII claims. Hopkins' complaint does not assert First Amendment and Title VII claims in separately numbered counts, as it does his due process and whistleblower claims. It does, however, list the First Amendment as a basis for the district court's jurisdiction and, more importantly, generally alleges in its due process count that Hopkins was dismissed because of statements he made regarding an employee's sexual harassment complaint and the Department's hiring practices. These factual allegations suggest First Amendment and Title VII claims and thus are sufficient, albeit perhaps marginally so, to satisfy the liberal pleading requirements of the federal rules.

Second, we must determine whether Hopkins' First Amendment and Title VII claims were encompassed within our qualified immunity ruling in Hopkins I. Our jurisdiction

over an interlocutory appeal challenging a district court's denial of qualified immunity "is limited to the resolution of the issue of qualified immunity." Mettler v. Whitledge, 165 F.3d 1197, 1202 (8th Cir. 1999). Accordingly, we have held that where a district court's summary judgment order addresses qualified immunity only as it relates to some of a plaintiff's claims and not to others, even though all such claims are part of a single action, we have jurisdiction only over those claims to which the district court expressly applied the principle of qualified immunity. See Jones v. Coonce, 7 F.3d 1359, 1365 (8th Cir. 1993).

The district court's summary judgment order considered the officials' qualified immunity only as it related to Hopkins' due process and whistleblower claims. See Hopkins v. Saunders, No. 94-4458, slip op. at 23-27 (W.D.Mo. Jan. 9, 1996). Our jurisdiction in Hopkins I was therefore limited to these claims and did not extend to Hopkins' First Amendment and Title VII claims. As a result, Hopkins I did not dispose of Hopkins' First Amendment and Title VII claims.

Finally, we must decide whether Hopkins waived his right to pursue his First Amendment and Title VII claims. "It is an axiom of trial procedure that counsel must take the initiative in protecting the rights of his clients." McNeely v. United States, 353 F.2d 913, 917 (8th Cir. 1965). "To obtain appellate review of a trial court's acts or omissions a party must have made known to the trial court the action which the party desires the court to take . . . ." Porterco, Inc. v. Igloo Products Corp., 955 F.2d 1164, 1173 (8th Cir. 1992) (citations omitted).

We recently applied these principles in Becker v. University of Nebraska at Omaha, 191 F.3d 904 (8th Cir. 1999). There, Becker asserted in his trial brief to the district court that the defendant university had expressly consented to

waive its Eleventh Amendment immunity to Becker's ADEA claim. Id. at 909 n.4. The district court, however, dismissed Becker's ADEA claim on Eleventh Amendment grounds without ever ruling on Becker's waiver argument. Id at 907, 909 n.4. On appeal, Becker reasserted his waiver argument, but we refused to reach the merits of this issue, finding that Becker had failed to preserve it for appellate review. Id. at 909 n.4. We noted that although Becker had asserted this argument in his trial brief, this alone was insufficient to preserve it for appeal where the district court never ruled on the issue. Id. Rather, we explained that to preserve his waiver argument for appeal Becker "should have called the district court's attention to its failure to decide the waiver issue." Id. Because Becker failed to actively assert this argument to the district court, we refused to consider it on appeal.

As in Becker, Hopkins failed to adequately assert his First Amendment and Title VII claims to the district court. Although Hopkins' second amended complaint marginally set forth these claims, the record is devoid of any evidence that Hopkins otherwise asserted them to the district court. At oral argument, Hopkins attempted to explain his failure to actively assert these claims by stating that he believed that the district court was first going to deal with his due process claim alone and then move on to his other claims. Although this may explain Hopkins' inactivity prior to the court's entry of a final judgment, it does not explain why he took no affirmative action immediately following the entry of judgment to call the district court's attention to the fact that it had not ruled on his First Amendment and Title VII claims. Hopkins challenged the district court's final judgment in two separate motions, but in neither motion did he raise his First Amendment or Title VII claims.

Therefore, although we believe that Hopkins sufficiently asserted First Amendment and Title VII claims in

his complaint and that these claims were not resolved by either this court or the district court, we nevertheless conclude that Hopkins waived his right to assert these arguments on appeal. "A party may not stand idly by, watching the proceedings and allowing the district court to commit error on which the party subsequently complains." Becker, 191 F.3d at 909 n.4 (quoting McNeely, 3 53 F.2d at 917). Accordingly, we affirm the district court's entry of a final judgment on all of Hopkins' claims, including his First Amendment and Title VII claims.

III.

We turn next to issues regarding Hopkins' section 1983 procedural due process claim. The district court found that Hopkins had a property interest in his job under the 1978 plan and that his due process rights were violated when he did not receive notice or a hearing prior to his dismissal. The court also found, however, that Hopkins was dismissed for cause and therefore refused to reinstate him, instead awarding him only nominal damages. Both parties challenge aspects of this ruling. Hopkins contends that the court's failure to order reinstatement is erroneous as a matter of law, fact, and procedure. The officials, in their cross-appeal, contend that the court erred in finding that Hopkins possessed a property interest in his job. The officials also argue that, even if the court was correct in its property interest finding, it erred in awarding Hopkins nominal damages and attorney fees.

A.

For the sake of analytical clarity, we turn first to the officials' claims on cross-appeal. The officials first assert that the district court erred in finding that Hopkins possessed a

recognized property interest in his position as Division director under the 1978 plan. We review this finding de novo, made as it was on cross-motions for summary judgment. Hossaini v. Western Mo. Med. Ctr., 140 F.3d 1140, 1142 (8th Cir.1998) (reviewing grant of summary judgment de novo).

To establish a procedural due process violation, a plaintiff must demonstrate that he has a protected property or liberty interest at stake and that he was deprived of that interest without due process of law. See Marler v. Mo. State Bd. of Optometry, 102 F.3d 1453, 1456 (8th Cir. 1996). A protected property interest exists where a plaintiff has a "legitimate claim of entitlement" to a benefit that is derived from a source such as state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). A plaintiff has a protected property interest in his employment if he can show "that he could have been fired only for good cause." Spitzmiller v. Hawkins, 183 F.3d 912, 916 (8th Cir. 1999).

To determine whether Hopkins had a protected property interest in his position as Division director, we must answer three questions. First, we must determine whether the 1978 plan applied to Hopkins in his capacity as Division director. Section BII of the plan, which is entitled "Coverage of the System," states that "the [merit] system established by this plan shall apply to, all offices, positions and employees of the Division of Grain Inspection, Weighing and Warehousing." This section then sets forth in detail the employees excluded from the coverage of the plan, listing six divisions within the Department and the staff of the Department's director as among those employees excepted from the plan.

Section BII therefore lends substantial support to the district court's conclusion that the 1978 plan was intended to apply to Hopkins. Section BII's reference to "all offices,

positions and employees" is sufficiently broad to encompass Hopkins' position as director of the Division. Furthermore, Section BII carefully defines those positions that are not covered by the plan, yet it fails to denote Hopkins' office as such a position. To be sure, Section BII is not entirely consistent with other language within the 1978 plan. Most notably, the plan's appeal procedures require Hopkins, in his capacity as director, to sit on the APRB to review employee terminations, which, if followed literally, would require Hopkins to review his own termination. While this result may be unorthodox (and there is no indication that recusal would not be permitted, if indeed not required, in that situation), we do not believe that it is sufficient to overcome the clear language of Section BII. Therefore, we find that the 1978 plan applied to Hopkins in his capacity as Division director.

Second, we must determine whether the 1978 plan was in effect at the time of Hopkins' dismissal. In adopting the appeal procedures of Chapter 36, the Department made clear that division directors and other specified Department employees were excluded from those procedures. There is no evidence, however, that the Department intended to abrogate existing merit systems governing those employees excluded from Chapter 36's coverage, nor does Chapter 36 itself suggest such an effect. Absent a clear intent to repeal existing merit systems, such as the 1978 plan, we cannot say that the district court erred in finding that the 1978 plan remained in effect at the time of Hopkins' discharge. Cf. United States v. Fausto, 484 U.S. 439,453 (1988) ("[A] later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two,"); Nichols v. Rysavy, 809 F.2d 1317, 1331 (8th Cir. 1987).

Finally, we must determine whether Hopkins had a legitimate entitlement to continued employment under the 1979 plan. See Roth, 408 U.S. at 577. Rule Number VI(l)(A)

of the plan states that "dismissals from employment shall be made for cause under rules uniformly applicable to all positions of employment," and that "[n]o ... dismissal shall be made because of favoritism, prejudice or discrimination." Rule Number VI(2)(A) reiterates this position by stating that management may not use "nonmerit factors" in deciding whether to retain an employee. The clear import of these and other provisions of the 1978 plan is that division directors such as Hopkins are not employees-at-will but may be dismissed only for cause, creating in the division directors a property interest protected by the rights guaranteed by the Due Process Clause. See Spitzmiller, 183 F.3d at 916; Pace v. Moriarty, 83 F.3d 261, 262-63 (8th Cir. t 996). Accordingly, the district court correctly found that Hopkins had a protected property interest in his position as Division director under the 1978 plan.

B.

The officials' second contention on cross-appeal is that the district court erred in awarding Hopkins nominal damages and attorney fees for the officials' violation of Hopkins' procedural due process rights. The propriety of the district court's nominal damage award, and derivatively its fee award, rests upon one issue: Whether a nominal damage award in a section 1983 action for the violation of procedural due process rights is legal or equitable in nature. In Hopkins I, we held that the officials were entitled to both qualified immunity and Eleventh Amendment immunity.[3] See Hopkins I, 93 F.3d at 527. Qualified immunity insulates a

[3] Despite our rulings in Hopkins I, Hopkins reasserts his contention that the officials are not entitled to qualified or Eleventh Amendment immunity. Because these arguments are precluded by the law of the case doctrine, we need not reconsider them. See Kinman v. Omaha Public School Dist., 171 F-3d 607, 610 (8th Cir 1999).

defendant from all claims for legal damages, but it does not shield a defendant from claims for equitable relief. See Pace, 83 F.3d at 263. The Eleventh Amendment protects a state official sued in his official capacity from all claims except for certain forms of prospective equitable relief, such as reinstatement. See Campbell v. Arkansas Dep't of Correction, 155 F.3d 950, 962 (8th Cir. 1998). Recognizing that our immunity rulings had foreclosed all legal remedies, we concluded Hopkins I by instructing the district court to rule only on Hopkins' "claim for equitable relief." Hopkins I, 93 F.3d at 527. Thus, Hopkins I, by both its remand instruction and its holdings, prohibited the district court from awarding Hopkins any form of legal relief. Therefore, if the nominal damage award is found to be legal in nature, it must be vacated.

The fact that a remedy may require one party to pay money to another is not a sufficient reason to characterize the remedy as "legal relief." Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570 (1990); see also Bowen v. Massachusetts, 487 U.S. 879, 894 (1988). However, because money damages was the traditional form of relief offered in the courts of law, "federal law has consistently held that money damages are generally characterized as a legal remedy." Kampa v. White Consolidated Indus., Inc., 115 F.3d 585, 586 (1997) (citing Terry, 494 U.S. at 570). Accordingly, a monetary award will be characterized as equitable only if it possesses one of the two fundamental attributes of an equitable remedy. Terry, 494 U.S. at 570, see also County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 642 (8tb Cir. 1996).

First, a monetary award may be an equitable remedy if the award is "restitutionary" in nature, "such as in actions for disgorgement of improper profits." Terry, 494 U.S. at 470 (citations omitted); see also Cass County, 88 F.3d at 642. Here, the district court's nominal damage award was not in

the form of restitution. By ordering the officials to pay $1.00 to Hopkins, the court was not restoring to Hopkins anything that was rightfully his, nor was it putting him in the position he would have been in had his due process rights been observed. See Black's Law Dictionary 1313 (6th ed. 1990) (defining restitution). Rather, the court's nominal damage award, like all nominal damages awarded for violations of procedural due process rights, merely signified that "the law recognizes the importance to organized society that [procedural due process] rights be scrupulously observed." Carey v. Piphus, 435 U.S. 247, 266 (1978).

Second, a monetary award may be deemed an equitable remedy if the award is "incidental to or intertwined with injunctive relief." Terry, 494 U.S. at 571; see also Cass County, 88 F.3d at 643. Because the district court refused to grant Hopkins reinstatement or any other injunctive relief, the damage award was neither incidental to nor intertwined with any other relief.

Under the Supreme Court's framework in Terry, therefore, the district court's nominal damage award was legal in nature. This conclusion is consistent with rulings from other circuits that have expressly held that nominal damages are inherently a legal remedy, regardless of the context in which they are awarded. See, e.g., United States v. Marolf, 173 F.3d 1213, 1219-20, n.5 (9th Cir, 1999); Griffith v. Col. Div. of Youth Servs., 17 F.3d 1323, 1327 (10th Cir. 1994); Landgraf v. USI Film Products, 968 F.2d 427, 431 (5th Cir. 1992), aff'd in part, 511 U.S. 244 (1994); Swanson v. Elmhurst Chrysler Plymouth. Inc., 882 F.2d 1235, 1240 (7th Cir. 1989).

We have analyzed the nature of nominal damages in two contexts. In White v. Armontrout, we affirmed the district court's vacation of a nominal damage award on qualified immunity grounds. 29 F.3d 357, 359, 361 (8th Cir.

1994); see also Hartley v. Fine, 780 F.2d 1383, 1388 (8th Cir. 1985). In doing so, we intimated that nominal damages are legal in nature, because qualified immunity erects a barrier to legal remedies only. See Pace, 83 F.3d at 263. Several other circuits have also implicitly recognized the legal nature of nominal damages by finding them to be barred by qualified immunity. See, e.g., Ruvalcaba v. Los Angeles, 167 F.3d 514, 524 (9th Cir. 1999); Cummins v. Campbell, 44 F.3d 847, 849 (10th Cir. 1994); Fox v. Board of Trustees of State Univ. of N.Y., 42 F.3d 135, 141 (2nd Cir. 1994), Hicks v. Feeney, 850 F.2d 152, 155 n.4 (3rd Cir. 1988); Rheuark v. Shaw, 628 F-2d 297, 299 (5th Cir. 1980).

We have implied a contrary view of nominal damages in the context of a Title VII action. Prior to 1991, Title VII's remedies were statutorily limited to injunctions and "such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay, or any other equitable relief as the court deems appropriate." 42 U.S.C.A. § 2000e-5(g)(1). Despite this limitation, we held in Dean v. Civiletti that a plaintiff who had established all the elements of a Title VII claim but was unable to show actual damages could recover nominal damages. 670 F.2d 99, 101 (8tb Cir. 1982) (per curiam); see also Parton v. GTE North, Inc., 971 F.2d 150, 154 (8th Cir. 1992); Maney v. Brinkley Mun. Waterworks & Sewer Dep't., 802 F.2d 1073, 1076 (8th Cir, 1986). Dean thus implied that, at least under Title VII, nominal damages are equitable in nature.

However ambiguous our earlier holdings, we are convinced that the court's damage award in the present case constitutes legal relief. First, the court's damage award does not possess either of the attributes of equitable relief set forth by the Supreme Court in Terry. Second, the majority of circuits have characterized nominal damages as legal in nature, either expressly or implicitly through rulings in

qualified immunity cases. Finally, we believe that White and its view of nominal damages is more apposite to the present case than the view intimated in Dean. White involved a section 1983 claim and the assertion of qualified immunity as a defense to that claim, see White, 29 F.3d at 360-61, whereas Dean involved a claim under Title VII and its narrow pre-1991 remedial framework, see Dean, 670 F.2d at 100. Hopkins' claim has much in common with the claim in White: it is based on section 1983 and is being challenged, at least in part, on qualified immunity grounds, In contrast, Hopkins' claim differs significantly from the claim in Dean: it does not implicate a statutory limitation on damages, such as that which existed under pre-1991 Title VII, or the concerns raised by such a limitation. Thus, we believe that White's suggestion that nominal damages are legal in nature applies in this case; and we see no reason to expand Dean's implicit view of nominal damages beyond the context of Title V11.

In summary, then, we conclude that because the award of nominal damages to Hopkins constitutes legal rather than equitable relief, it runs counter to our remand instructions and our immunity holdings in Hopkins I and therefore must be reversed.

Likewise, we must also vacate the award of attorney fees to Hopkins. Section 1988 of Title 42 provides that the court, in its discretion, may grant "the prevailing party" reasonable attorney fees. 42 U.S.C. § 1988(b). "[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." Farrar v. Hobby, 506 U.S. 103, 111 (1992). Absent the nominal damage award, Hopkins has obtained no relief on the merits of his claim, Hopkins received only a declaration that his procedural due process rights were violated. The "moral satisfaction" of such a declaration, without more, is not

sufficient to confer prevailing party status on a plaintiff. See Hewitt v. Helms, 482 U.S. 755, 762-63 (1987).

C.

We turn next to Hopkins' challenges to the district court's resolution of his procedural due process claim, all of which attack the court's refusal to reinstate Hopkins to his position as Division director. First, Hopkins argues that Missouri law, not federal law, establishes the appropriate remedy for the procedural due process deprivation that he suffered and that the remedy required by Missouri law is reinstatement. Thus, according to Hopkins, the district court erred by refusing to look to Missouri law in fashioning a remedy. Because the decision whether to follow state law involves a question of law, we review the district court's ruling de novo. See McCuskey v. Central Trailer Serv., Ltd., 37 F.3d 1329, 1330-31 (8th Cir. 1994) (reviewing district court's legal conclusions de novo).

The Supreme Court defined the proper remedy for the denial of procedural due process in Carey v. Piphus, holding that the remedy for a procedural due process violation is defined by the extent of the injury that resulted from the denial of constitutionally required process. 435 U.S. at 263-64; see also Perry v. Brakke, 826 F.2d 740, 747 (8th Cir. 1987). Thus, in the context of public employment, reinstatement is proper only where a tenured employee would not have been dismissed if his procedural due process rights had been observed. See Brewer v. Chauvin, 938 F,2d 860, 864 (8th Cir. 1991). Where an employee would have been discharged even if he had received due process, i.e. was discharged for cause, his sole injury is the lack of process and only nominal damages are proper. See id.

Carey therefore makes clear that federal law defines the proper remedy for a procedural due process violation. See Brewer, 938 F.2d at 863 (quoting Peery v. Brakke, 826 F.2d 740, 747 (8th Cir. 1987)). Carey looks solely to the process to which a plaintiff is entitled, which is also defined by federal law, see Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985), and determines the degree of injury that occurred because of the denial of that constitutionally mandated process. See Brewer, 938 F.2d at 863-64. State law is irrelevant to this analysis. Therefore, the district court properly looked to federal law, rather than Missouri law, in determining the proper remedy for Hopkins' procedural due process deprivation.

D.

Hopkins also contends that, even if the district court was correct in applying the Carey remedial framework, there was insufficient evidence to support the court's finding that Hopkins was dismissed for cause. Whether an employee "would have been fired even if he had been accorded due process is a finding of fact, which we may not set aside unless clearly erroneous." Rogers v. Kelly, 866 F-2d 997, 1000 (8th Cir. 1989). We therefore must affirm the court's finding if its "account of the evidence is plausible in light of the record viewed in its entirety." Id. (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985)).

Following an evidentiary hearing, the district court found that Hopkins was discharged because his confrontational and autonomous managerial style conflicted with the cooperative, consensus-based form of management that Saunders was attempting to create within the Department. The court thus found that Hopkins would have been dismissed even if he had received due process. This finding is supported by evidence that Hopkins repeatedly

resisted Saunders' attempts to coordinate matters at the director level. For example, Hopkins refused to rely on the central personnel office, instead maintaining his own employee files, and disregarded Saunders' attempt to coordinate certain functions through the Department's Administrative Services. In addition, there was testimony that Hopkins managed his own division through intimidation and fear. This dictatorial managerial style both conflicted with Saunders' approach and harmed employee morale within the Division. Accordingly, we can not say that the district court committed clear error in finding that Hopkins would have been dismissed even if he had received due process.

E.

Finally, Hopkins argues that the district court's evidentiary hearing regarding the cause of his dismissal was procedurally defective in several respects. First, Hopkins contends that he was denied procedural due process at the hearing itself because he was never given a written notice prior to the hearing setting forth the officials' alleged basis for his dismissal. Although it is not clear that no such notice was provided to Hopkins prior to the hearing, we believe that even if he never received a formal notice, Hopkins was not denied due process because the fundamental purposes of due process--"notice and an opportunity to respond"--were served. Loudermill, 470 U.S. at 546; see also Heinen v. Brewer, 171 F. 3 d 612, 614 (8th Cir. 1999). Hopkins had the benefit of and utilized discovery and the power of subpoena to prepare for the hearing. He was therefore able to fully apprise himself of the officials' asserted grounds for dismissal and could adequately present a defense at the hearing.

Second, Hopkins contends that the district court incorrectly denied his Rule 60(b) motion for relief, in which

he alleged that defense witnesses "systematically manipulated" their testimony by conversing in the hallway prior to testifying at the hearing. We review the district court's ruling on this issue for abuse of discretion. See United States v. Covington, 133 F.3d 639, 645 (8th Cir. 1998) (applying abuse of discretion review to the district court's refusal to grant a mistrial because of communication between witnesses). No such abuse exists here. Hopkins supports his claim of witness misconduct with five affidavits that assert that several defense witnesses conversed in the hallway outside of the courtroom. However, evidence of communication between witnesses, by itself, is insufficient to warrant relief under Rule 60(b) for improper witness communication. See id. In order to obtain Rule 60(b) relief, Hopkins must also demonstrate that the contact between witnesses "resulted in the tailoring of witness testimony . . . or the development of less than candid testimony." Covington, 133 F.3d at 645 (quoting United States v. Kindle, 925 F.2d 272, 276 (8th Cir. 1991). Hopkins has made no such showing.

Third, Hopkins asserts that the district court improperly permitted Carol Heminghaus, a defense witness, to be present 'in the courtroom prior to her testifying. The decision whether to exclude a witness from the courtroom is "committed to the sound discretion of the trial court." United States v. Wilson, 103 F.3d 1402, 1406 (8th Cir. 1997). Here, the court acted well within its discretion. Heminghaus was a member of the APRB that would have heard Hopkins' appeal in 1994 had a hearing been held, and her testimony at trial concerned whether she would have affirmed Hopkins' dismissal at that time. Thus, Heminghaus was "a person whose presence. . . [was] essential to the presentation of the party's cause," Fed. R. of Evid. 615, because in order to credibly testify regarding how she would have ruled in 1994, it was necessary that Heminghaus first hear the evidence that she would have heard in 1994. Thus,

not only was Heminghaus's presence in the courtroom permissible, it may have been essential.

IV.

We reverse that portion of the district court's judgment which awards Hopkins nominal damages and attorney fees. In all other respects, the judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TOMMY D. HOPKINS, Plaintiff,	)	
vs.	)	No. 94-4458- CV-C-SOW
JOHN L. SAUNDERS, et al-, Defendants.	)	

ORDER

Before this Court are plaintiff's Motion for Relief Under Rule 60(b). Defendants failed to file a response.

Plaintiff asserts that the defense violated this Court's order that witnesses not discuss their testimony with other witnesses. Plaintiff argues that the appropriate sanction is to disqualify the witnesses involved in this miscarriage of justice. Plaintiff states that this Court should either (a) reopen the hearing and disqualify these defense witnesses from testifying, or (b) reconsider the evidence presented at trial, disregarding evidence of these witnesses.

This Court would have made the same findings had it only considered the testimony of defendant John Saunders and plaintiff Tommy Hopkins. Defendant Saunders was the first witness to testify and, therefore, the alleged misconduct would not have influenced his testimony,

Accordingly, it is hereby

ORDERED that plaintiff's Motion for Relief Under Rule 60(b) (doc. #144) is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

June 16th, 1998.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TOMMY D. HOPKINS, Plaintiff,	)	
vs.	)	No. 94-4458- CV-C-SOW
JOHN L. SAUNDERS, et al., Defendants.	)	

ORDER

Before this Court is plaintiff's Rule 59 Motion to Reconsider and Set Aside a Portion of the Order and Judgment Entered on February 27, 1998, and defendants' Opposition.

On February 27, 1998, this Court held that:

(1) because plaintiff's procedural due process rights were violated, plaintiff shall be awarded nominal damages in the amount of $1.00; and

(2) plaintiff is not entitled to reinstatement, because he would have been fired even if he had received due process.

Plaintiff requests a hearing regarding the mental and emotional distress he suffered as a result of his firing and the amount of back pay he should be awarded. Plaintiff asserts that he should be awarded back pay from the date of his

firing, June 10, 1994, until the date the Court held its hearing on December 17-18, 1997.

Plaintiff's claims for back pay and damages for mental or emotional distress are barred by the Eleventh Amendment. Hopkins v. Saunders, 93 F.3d 522, 526-27 (8th Cir. 1996). Plaintiff is not requesting, and is not entitled to, back pay for the post-order period. See Barnes v. Bosley, 828 F.2d 1258 (8th Cir. 1987). Additionally, plaintiff is asserting that the mental and emotional distress he suffered was a result of his firing, not lack of a hearing.

Accordingly, it is hereby

ORDERED that plaintiff's Rule 59 Motion to Reconsider and Set Aside a Portion of the Order and Judgment Entered on February 27, 1998 (doc. #139) is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

April 22, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TOMMY D. HOPKINS,)

Plaintiff,)

vs.) No. 94-4458- CV-C-SOW

JOHN L. SAUNDERS, et al.,)

Defendants.)

ORDER

In an order dated September 30, 1997, this Court held the following:

(1) the Merit System Plan and Rules and Regulations apply to plaintiff as the Director of the Division;

(2) based on the Merit System Rules and Regulations, plaintiff had a property interest, or a legitimate claim of entitlement, in continued employment unless dismissed for cause; and

(3) because plaintiff had a property interest in continued employment unless dismissed for cause and plaintiff was terminated from his position as Director of the Division by Department Director Saunders without receiving

prior notice or a hearing, plaintiff's procedural due process rights were violated.

This Court held an evidentiary hearing December 17-18, 1997, to determine whether plaintiff would have been fired even if he had received due process. This Court finds that plaintiff was fired for cause. Specifically, plaintiff was fired for the good of the service and because his management style conflicted with the management style of Deputy Director Saunders. As Division Director, plaintiff exhibited behavior in his management style that adversely affected employee job performance, the atmosphere in his Division and the quality of work performed in the Department as a whole. Plaintiff displayed a management style that indicated he was not willing to accept suggestions or directions in operating his division more effectively and efficiently. Plaintiff maintained an autonomous form of management which was directly contrary to Director Saunders' style of management and adverse to the team approach that Director Saunders strongly encouraged in the Department.

Because plaintiff's procedural due process rights were violated, plaintiff is entitled to nominal damages. Brewer v. Chauvin, 938 F.2d 860, 862-64 (8th Cir. 1991). Plaintiff is not entitled to reinstatement, because he would have been fired even if he had received due process. Rogers v. Kelly, 866 F.2d 997, 1000-1001 (8th Cir. 1989)

Also before this Court is plaintiff's Motion for Attorney's Fees and Costs (doc. #132). Pursuant to 42 U.S.C. §1988, plaintiff is seeking attorney's fees and costs as the prevailing party. The U.S. Supreme Court has held that "a plaintiff who wins nominal damages is a prevailing party under §1988." Farrar v. Hobby, 506 U.S. 103, 112 (1992). In her concurring opinion, Justice O'Connor enumerated three factors that should be considered in determining whether and how much a prevailing party should be awarded in attorney's

fees: (1) the difference between the amount recovered and the damages sought; (2) the significance of the legal issue on which the plaintiff prevailed; and any public goal or purpose the litigation might have served. Id. at 116-122; Jones v. Lockhart, 29 F.3d 422, 423-24 (8th Cir. 1994).

Taking these factors into consideration, this Court finds that plaintiff's counsel is entitled to attorney's fees. Not only did plaintiff establish that his procedural due process rights were violated, but he also furthered the public policies that require the employees of the Division of Grain Inspection, Weighing and Warehousing be employed based on job qualifications rather than political affiliations. Additionally, plaintiff's counsel represented plaintiff in an efficient manner and requested a modest hourly rate. Based on counsel's itemization of his fees and expenses, this Court finds that plaintiff's counsel should be awarded $43,764.00 for attorney's fees (364.7[4] hours @ $120.00/hour) and $6,236.41 for expenses.

Plaintiff's counsel has also requested leave to withdraw as counsel for plaintiff. Local Rule 83.5(o) states the following:

> Counsel may not be relieved from further representation of a client without obtaining leave of Court. Such leave will ordinarily be denied unless entry of appearance by substitute counsel is assured or has occurred.

Accordingly, Venters' Motion to Withdraw (doc. #135) is denied and may be refiled after substitute counsel has entered an appearance.

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[4] Counsel requested compensation for 393.4 hours but only provided itemized times for 364.7 hours.

It is hereby

ORDERED that, pursuant to an evidentiary hearing held December 17-18, 1997, this Court finds that plaintiff was fired for cause. Specifically, plaintiff was fired for the good of the service and because his management style conflicted with the management style of Deputy Director Saunders. As Division Director, plaintiff exhibited behavior in his management style that adversely affected employee job performance, the atmosphere in his Division and the quality of work performed in the Department as a whole. Plaintiff displayed a management style that indicated he was not willing to accept suggestions or directions in operating his Division more effectively and efficiently. Plaintiff maintained an autonomous form of management which was directly contrary to Director Saunders' style of management and adverse to the team approach that Director Saunders strongly encouraged in the Department. It is further

ORDERED that because plaintiff's procedural due process rights were violated, plaintiff shall be awarded nominal damages in the amount of $1.00. It is further

ORDERED that plaintiff is not entitled to reinstatement, because he would have been fired even if he had received due process. It is further

ORDERED that plaintiff's motion for attorney's fees and costs (doc. #132) is granted. It is further

ORDERED that plaintiff's counsel shall be awarded $43,764.00 for attorney's fees (364.7 hours @ $120.00/hour). It is further

ORDERED that plaintiff's counsel shall be awarded $6,236.41 for expenses. It is further

ORDERED that Venters' Motion to Withdraw (doc. #135) is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

February 27, 1998.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TOMMY D. HOPKINS, Plaintiff,	)	
vs.	)	No. 94-4458- CV-C-SOW
JOHN L. SAUNDERS, et al., Defendants.	)	

ORDER

Pursuant to a telephone conference held October 31, 1997, it is hereby

ORDERED that Defendants shall file the notice required by the Merit System Plan and Rules and Regulations by **November 19, 1997.** It is further

ORDERED that witness and exhibit lists and findings of fact and conclusions of law shall be filed by **December 8, 1997.** It is further

ORDERED that an evidentiary hearing on the issue of whether Hopkins would have been fired even if procedural due process had been observed shall be held at the U.S. District Courthouse in Jefferson City, Missouri on **December 17, 1997,** at 9:00 a.m.

/s/ Scott O.Wright
SCOTT O. WRIGHT
Senior United States District Judge

November 7th, 1997.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TOMMY D. HOPKINS,)

Plaintiff,)

vs.) No. 94-4458- CV-C-SOW.

JOHN L. SAUNDERS, et al.,)

Defendants.)

ORDER

Before this Court are defendants' Second Motion for Summary Judgment, plaintiff's Opposition and Counter-Motion for Summary Judgment, and defendants' Reply. For the following reasons, defendants' Motion will be denied and plaintiff's Motion will be granted.

I. Background

Plaintiff Tommy D. Hopkins ("plaintiff") was the Director of the Division of Grain Inspection and Warehousing ("the Division") in the Missouri Department of Agriculture ("the Department") from approximately August 1981 until June 10, 1994. On June 10, 1994, plaintiff was terminated from his position as Division Director by Department Director Saunders without receiving prior notice or a hearing.

Plaintiff sought review of the decision by filing an appeal with the Agriculture Personnel Review Board

("APRB"). The Department responded with a letter explaining that the APRB did not exist.

Plaintiff filed an appeal with the Personnel Advisory Board ("PAB"). The PAB dismissed plaintiff's appeal, holding that the Department had adopted the PAB's appeal procedures for most of its employees but not for its division directors.

The Department agreed with the PAB's result, but not its rationale, and appealed to the Circuit Court. Plaintiff successfully moved to dismiss the appeal on the theory that the state was the prevailing party below.

Plaintiff filed the present complaint seeking $6 million in compensatory damages, $3 million in punitive damages and injunctive relief. The Department moved for summary judgment on the basis of qualified and Eleventh Amendment Immunity. This court denied the Department's motion.

The Eighth Circuit reversed and remanded, granting defendants immunity from damages on the issue of plaintiff's due process claim. The Eighth Circuit remanded plaintiff's claim for equitable relief for further proceedings.

II. Standard

A motion for summary judgment should be granted if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); Rafos v. Outboard Marine Corp., 1 F. 3d 707, 708 (8th Cir. 1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). A defendant who moves for summary judgment has the burden of showing that there is no genuine issue of fact for trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A plaintiff opposing a properly supported motion for summary judgment may not rest upon the allegations of his pleadings, 'but must set forth specific facts showing them is a genuine issue for trial." Id.

III. Discussion

Defendants argue that the Court of Appeals recognized that plaintiff failed to prove he had a property right in continued employment and the Court of Appeals' ruling should, therefore, end this litigation. Plaintiff argues this court previously decided plaintiff had a property interest in his continued employment and, based on the doctrine of the law of the case, this issue should not be relitigated.

The Eighth Circuit Court of *Appeals stated* that:

> After a careful reading of the plan itself, we are unable to determine whether it grants Hopkins a property right. Although the plan states that it shall apply to 'all offices, positions and employees' of the Division, the general language in the plan indicates that it does not apply to the division director but is to be used by the division director in dealing with his subordinates. . . . Clearly, there was confusion when Hopkins was dismissed as to whether a division director had a continued right of employment, and the officials are thus entitled to qualified immunity on Hopkins, due process claim.

Hopkins v. Saunders, 93 F.3d 522, 526 (8th Cir. 1996). The Eighth Circuit Court of Appeals did not determine whether plaintiff had a continued right of employment. The Eighth Circuit held that the officials were entitled to qualified immunity because it was unclear when plaintiff was dismissed whether plaintiff had a continued right of

employment. Whether plaintiff had a property interest in continued employment is the issue that is now before this Court.

Defendants argue that Hopkins did not have a property interest in his position as a Division Director and, therefore, he cannot state a claim under 42 U.S.C. §1983. Plaintiff asserts that he had a property interest in continued employment by virtue of the U.S. Grain Standards Act and the rules and regulations promulgated pursuant to the federal law, the February 1, 1978, Executive Order, and the Merit System Plan and Rules and Regulations published by the Missouri Department of Agriculture.

To have a property interest, plaintiff must have "a legitimate claim of entitlement" in a benefit. Board of Regents v. Roth, 408 U.S.' 564, 577 (1972). This "legitimate claim of entitlement" is created and defined "by existing rules or understandings that stem from an independent source such as state law." Id.; Perry v. Sinderman 408 U.S. 593, 601 (1972) (citing Roth, 408 U. S. at 577) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."). If a property interest exists, plaintiff would be "entitled to a hearing or some related form of due process prior to termination." Packett v. Stenberg, 969 F.2d 721, 725 (8th Cir. 1992) (citing Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)).

On February 15, 1978, the Director of the Department filed with the Secretary of State a plan to establish a system of personnel administration based on merit principles for the employees of the Division ("Merit System Plan") as required by the Governor's Executive Order of February 1, 1978. Section A of the Merit System Plan, entitled Basis for the Plan, states that:

> [t]he United States Grain Standards Act (As Amended) requires that a state agency must employ personnel on the basis of job qualifications, rather than political affiliations, in order to qualify for designation as an official agency to perform official inspection and weighing services or to give official supervision of weighing functions; . . .

July18, 1978, the Department filed with the Secretary of State Merit System Rules and Regulations for the Division. The Merit System Plan and Rules and Regulations established the APRB to conduct appeal hearings. Plaintiff sought review of his termination by filing an appeal with the APRB, but the Department responded with a letter explaining that the APRB did not exist. The first question is whether plaintiff, as the Director of the Division, held a position within the classified service category and whether the Merit System Plan and Rules and Regulations, therefore, applied to plaintiff. Section BII, entitled Coverage of the System, states that (emphasis added):

> **All employees** of the Missouri Department of Agriculture shall be divided into the following services:
>
> 1. Classified Service. The classified services shall consist of, and the provision of the Governor's Executive Order and the system established by this plan shall apply to, **all offices, positions, and employees of the Division of Grain Inspection, Weighing and Warehousing**, that are existing now or hereafter created.
>
> 2. Unclassified Service. The unclassified service shall consist of, and the provisions of the Governor's Executive Order and of the system established by this

plan **shall not apply to**, all offices, positions and employees of the Division of Administrative Services, Division of Animal Health, Division of Plant Industries, Division of Audits and Compliance, Division of Weights and Measures, Division of Fairs, Division of Agricultural Development, Fiscal Office, and the office and staff of the Director and Deputy Director of the Missouri Department of Agriculture, that are existing now or hereafter created.

"All offices, positions and employees" is broad language that would include the Director of the Division of Grain Inspection, Weighing and Warehousing. Additionally, the language clearly states when the plan shall not apply. If the Division Director was not to be covered by the Merit System Plan, the drafters could have listed it as one of offices or positions the plan would not apply to.

It is true, as the Eighth Circuit noted, that the general language of the Merit System Plan indicates that the plan is to be used by the Division Director in dealing with subordinates. Court finds, however, that the fact the Merit System Plan is to be used by the Division Director in dealing with subordinates is insufficient to overcome the clear language that makes the Merit System Plan also applicable to the Division Director.

This Court also finds that the Merit System Plan is still in effect as to plaintiff even though the Department adopted the appeal procedures under Chapter 36 for most of its employees because the Department expressly excluded division directors from coverage. Accordingly, this Court finds that the Merit System Plan and Rules and Regulations apply to plaintiff as the Division Director.

The next question is whether plaintiff had a legitimate claim of entitlement to continued employment unless

dismissed for cause because of the Merit System Plan and Rules and Regulations. Were there rules or mutually explicit understandings that support plaintiff's claim of continued employment unless dismissed for cause and that plaintiff may invoke at a hearing?

Rule Number VI (1)(A) states in part (emphasis added):

> Demotions in, and **dismissals from employment shall be made for cause** under rules uniformly applicable to all positions of employment. No appointment, promotion, demotion, or dismissal shall be made because of favoritism, prejudice or discrimination.

Rule Number VI (2)(A) states in part (emphasis added):

> Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline, or any other aspect of personnel administration, because of political or religious opinions or affiliations or because of race, national origin, or **any other non-merit factors is prohibited**.

Rule Number VI (2)(B) states in part:

> An applicant or employee who feels himself adversely affected in his opportunity for employment, in his status as an employee, or in his condition of employment because of discrimination may under this rule appeal to the board for a review of the alledged (sic) discriminatory action or practice.

The causes for suspension, demotion and dismissal of any employee in the classified service are enumerated in Rule Number VIII(2) and under Rule Number VIII(5) an

employee in the classified service can be dismissed when the good of the service will be served thereby.

Based on these Merit System Rules and Regulations, plaintiff had a property interest, or legitimate claim of entitlement, in continued employment unless dismissed for cause. Plaintiff's property interest in continued employment is further reinforced by the Employee Information Handbook for the Department and by various agreements entered between the United States Department of Agriculture and the Missouri Department of Agriculture. See plaintiff's exhibits 6-8, 11 and 13.

Because a property interest existed, plaintiff was entitled to a hearing or some related form of due process prior to termination." Packett, 969 F.2d at 725 (citing Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)). Both plaintiff and defendants agree that plaintiff was terminated from his position as Director of the Division by Department Director Saunders without receiving prior notice or a hearing. Accordingly, plaintiff's procedural due process rights were violated.

IV. Conclusion

This Court finds that the Merit System Plan and Rules and Regulations apply to the plaintiff as the Director of the Division. Based on the Merit System Rules and Regulations, plaintiff had a property interest, or a legitimate claim of entitlement, in continued employment unless dismissed for cause. Because plaintiff had a property interest in continued employment unless dismissed for cause and plaintiff was terminated from his position as Director of the Division by Department Director Saunders without receiving prior notice or a hearing, plaintiff's procedural due process rights were violated.

The Eighth Circuit Court of Appeals ruled that defendants are immune from damages on the issue of plaintiff's due process claim. Both parties shall file briefs by October 5, 1997, that address the appropriate equitable relief plaintiff should be awarded.

Accordingly, it is hereby

ORDERED that defendants' Second Motion for Summary Judgment (doc. #90) is denied. It is further

ORDERED that plaintiff's Counter-Motion for Summary Judgment (doc. #98) is granted. It is further

ORDERED that both plaintiff and defendants shall file briefs addressing the issue of equitable relief by October 5, 1997.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

September 30, 1997.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 96-1174WMJC

Tommy D. Hopkins,	*	
	*	Order Denying
Appellee,	*	Petition for Rehearing
v.	*	and Suggestion for
	*	Rehearing En Banc
John L. Saunders, et al.,	*	
	*	
Appellants	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 23, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court Of Appeals , Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-1174

Tommy D. Hopkins, Plaintiff/Appellee,	*	
v.	*	Appeal from the United States District Court for the Western District of Missouri.
John L. Saunders, Kyle Vickers, Defendants/Appellants,	*	
Charles Ausfahl, Defendant,	*	
Roy Temple, Beth M. Wheeler, Defendants/Appellants.	*	

Submitted: June 10, 1996

Filed: August 23, 1996

Before WOLLMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and DOTY,* District Judge.

WOLLMAN, Circuit Judge.

After Tommy D. Hopkins was terminated from his job as Director of the Division of Grain Inspection and

* The HONORABLE DAVID S. DOTY, United States District Judge for the District of Minnesota, sitting by designation.

Warehousing (the Division) of the Missouri Department of Agriculture (the Department), he brought this 42 U.S.C. § 1983 action against John L. Saunders, Director of the Department, and others, in their individual and official capacities, (collectively, the officials), alleging that he had been dismissed in violation of his due process rights and in violation of Missouri's whistleblower statute. The officials appeal the district court's denial of their motion for summary judgment based on qualified and Eleventh Amendment immunity. We reverse and remand.

I.

Prior to the enactment of the 1976 United States Grain Standards Act, the Division was operating as a patronage organization. The Grain Standards Act, and the regulations promulgated pursuant thereto, required the Division to instead "employ personnel on the basis of job qualifications rather than political affiliations." 7 U.S. C. § 79 (f) (1) (A) (ix) ; see also 7 C.F.R. § 800.195(f) (2) ; 7 C.F.R. § 800.196(g) (3) (ii) . In response to the Grain Standards Act, the governor of Missouri issued an executive order in 1978 requiring the Department to establish a formal merit system for its Division employees. Pursuant to the executive order, the Department drafted a merit system plan (the plan), which was submitted to the United States Department of Agriculture for approval. The plan established an Agriculture Personnel Review Board (APRB) to conduct appeal hearings for Division employees.

In 1979, the Missouri legislature enacted a state merit system law, found in Chapter 36 of the Missouri Revised Statutes. The law established a Personnel Advisory Board (PAB) to hear appeals of merit system employee dismissals. Some merit employees were not covered by the law. For example, Chapter 36 expressly excluded division directors from its coverage. See Mo. Rev. Stat. § 36.030.1(1). On May

28, 1982, the Department adopted the PAB dismissal procedures for most of its employees. Division directors were among the employees the Department excluded from coverage. In a letter adopting the PAB procedures, the Department agreed, however, to provide "substantially similar" appeal procedures for the excluded employees pursuant to Missouri Revised Statute section 36.390.8 if such procedures were legally required.[5]

On June 10, 1994, Hopkins was terminated from his position as division director by the Department without receiving prior notice or a hearing. He sought review of the decision by filing an appeal with the APRB, the board established pursuant to the plan. The Department responded with a letter explaining that the plan was void and that the APRB no longer existed.

Hopkins then filed an appeal with the PAB. The Department moved to dismiss the appeal, arguing that Hopkins was specifically excluded from Chapter 36 coverage and that he failed to state a claim under Missouri's whistleblower law. Hopkins urged the PAB to determine that it lacked jurisdiction over his claim because the APRB still existed and was the proper forum. He requested that the matter be remanded to the APRB. After conducting a hearing to determine whether it had jurisdiction, the PAB dismissed the case, holding that the Department had adopted the PAB's appeal procedures for its regular employees but not for its division directors. It held that the plan's appeal procedures still applied to dismissals of regular Division employees who were excepted from the PAB's appeal procedures. The Department agreed with the PAB's result but not with its rationale and sought review in Missouri state court. Hopkins

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[5] Section 36.390.8 provides that non-merit agencies "shall adopt dismissal procedures substantially similar to those provided for merit employees."

successfully moved to dismiss the appeal because the Department was the prevailing party before the PAB. Hopkins then filed the present complaint in district court, seeking $6 million in compensatory damages, $3 million in punitive damages, and injunctive relief in the form of reinstatement.

II.

We review the trial court's denial of a motion for summary judgment de novo. Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992). Summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A. Qualified Immunity

Under the doctrine of qualified immunity, government officials are generally immune from suit in performing discretionary duties if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "[Q]ualified immunity is more than a defense to suit; it grants government officials the right not to be subject to the burden of trial at all." Billingsley v. St. Louis County, 70 F.3d 61, 63 (8th Cir. 1995) (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). Whether a government official is entitled to qualified immunity is a question of law. Engle v. Townsley, 49 F.3d 1321, 1323 (8th Cir. 1995).

To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Runge v. Dove, 857 F.2d 469, 472 (8th Cir. 1988). Instead, a plaintiff "must make a "particularized showing' that a "reasonable official would

understand that what he is doing violated that right' or that 'in the light of preexisting law the unlawfulness' of the action was 'apparent.' Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

The officials argue that Hopkins did not have a constitutionally protected right to continued employment. They allege that even if the initial plan applied to Hopkins as division director, Hopkins lost any entitlement to a right of continued employment when the Department adopted the PAB's dismissal procedures. Hopkins, on the other hand, alleges that the Department adopted the PAB procedures for its regular employees only -- thus, the appeal procedures established by the plan are still in effect as to him.

In denying the officials' claim of qualified immunity, the district court agreed with Hopkins and held that "[w]hile the specific procedures to be followed might have been debatable at the time of plaintiff's termination, the fact that he was entitled to some due process was well established[.]" The district court pointed to the Grain Standards Act and to the plan itself, which provided that employees of the Division be employed on the basis of qualifications rather than political affiliations. It held that a reasonable official should have been aware of the laws governing the dismissal of employees and accordingly refused to grant immunity.

Contrary to the district court's conclusion, we find no violation of clearly established law. Hopkins clearly had no continued right of employment under the state merit system law. Although the Department adopted the PAB's appeal procedures under Chapter 36 in 1982, both chapter 36 and the Department itself expressly excluded division directors from coverage. Moreover, in Brown v. Personnel Advisory Bd., 879 S.W.2d 581, 584-85 (Mo. Ct. App. 1994), the Missouri Court of Appeals rejected a part-time employee's argument that the Grain Standards Act required the

Department to use the PAB procedures for all employee dismissals.

Although the Department agreed to adopt similar dismissal procedures for division directors if required by law under section 36.390.8, the officials are nevertheless entitled to qualified immunity. Missouri courts have not yet decided whether section 36.390.8 confers a property interest in continued employment or whether it merely gives employees a right to receive review procedures. Thus, in Pace v. Moriarty, 83 F.3d 261, 263 (8th Cir. 1996), we held that state officials were entitled to qualified immunity on an employee's claim for damages based on section 36.390.8. Likewise the officials in the present case cannot be held to have violated a clearly established right when it is unclear whether section 36.390.8 bestows such a right.

Having concluded that Hopkins had no clearly established right to continued employment under the state merit system law, we turn to the question whether he had such a right under the Department of Agriculture merit plan. After a careful reading of the plan itself, we are unable to determine whether it grants Hopkins a property right. Although the plan states that it shall apply to "all offices, positions and employees" of the Division,, the general language in the plan indicates that it does not apply to the division director but is to be used by the division director in dealing with his subordinates. In fact, under the plan, the division director was a member of the APRB and would thus be entitled to hear his own appeal.

Clearly, there was confusion when Hopkins was dismissed as to whether a division director had a continued right of employment, and the officials are thus entitled to qualified immunity on Hopkins' due process claim. See Tubbesing v. Arnold, 742 F.2d 401, 406-07 (8th Cir. 1984) (commissioners entitled to qualified immunity when it was

not clear whether employee policy manual establishing a property right in employment applied to director). Moreover, it was unclear whether Hopkins was subject to either the plan's dismissal procedures or those provided pursuant to section 36.390.8. Our review of the record leads us to the conclusion that the only thing that is clear in this case is that the law was unsettled at the time of Hopkins' dismissal.

The officials further claim that they are entitled to qualified immunity on Hopkins' claim that he was denied a right to a post-termination hearing under Missouri's whistleblower statute. See Mo. Rev. Stat. § 105.055.[6] The Missouri courts have not yet interpreted this statute. The district court determined, however, that the right to such a hearing was clearly established by section 105.055 and thus denied the officials qualified immunity. We disagree. The relevant issue for qualified immunity purposes is whether the officials violated clearly established law when they refused to grant Hopkins a hearing on his section 105.055 claim before the APRB. Because it was not clearly established that the plan's appeal procedures applied to Hopkins as division director at the time of his dismissal, the officials were not violating any clearly established right when they denied him a hearing before the APRB. See Warner v. Graham, 845 F.2d 179, 182 (8th Cir. 1988) ("official may not be charged with knowledge that his conduct was unlawful unless it has been previously identified as such"). Accordingly, the officials are also entitled to qualified immunity on this claim.

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[6] Section 105.055(5) states, in relevant part:

Any employee may file an administrative appeal whenever the employee alleges that disciplinary action was taken against the employee in violation of this section. The appeal shall be filed with the state personnel advisory board; the provided that the appeal shall be filed with the appropriate agency review board or body of nonmerit agency employers which have established appeal procedures substantially similar to those provided for merit employees . . .

B. Eleventh Amendment Immunity

Because they were sued in their official capacities, the officials also seek Eleventh Amendment immunity from Hopkins' request for money damages. The Eleventh Amendment prohibits a citizen from suing a state for money damages in federal court. Welch v. Texas Dep't of Hwys. & Public Transp., 483 U.S. 468, 472 (1987). Even when a state is not named as a party to the act on, the suit may still be barred by the Eleventh Amendment. A state official is entitled to Eleventh Amendment immunity if immunity will "'protect the state treasury from liability that would have had essentially the same practical consequences as a judgement against the State itself.'" Hadley v. North Ark. Community Technical College, 76 F.3d 1437, 1438 (8th Cir. 1996), petition for cert filed, 65 U.S.L.W. 3001 (U.S. June 24, 1996) (No. 95-2060) (citations omitted); see also Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945) ("when the action is in essence one for the recovery of money from the state, the state . . . is entitled to invoke is sovereign immunity from suit even though individual officials are nominal defendants").

In considering whether the officials were entitled to Eleventh Amendment immunity, the district court noted that a critical factor was whether any judgment "would ultimately come out of state funds or whether a judgment could be paid out of non-state funds under the agency's discretionary control." The district court then refused to grant immunity, holding that Hopkins had raised a valid claim as to whether any money damages could be paid from non-state funds.

Hopkins suggested that any monetary award could be paid out of the grain inspection fee fund, which is separate from the state's general revenue fund. It is true that Missouri law requires grain inspection fees to be kept in a separate account. See Mo. Rev. Stat. § 411.151. However, under

section 411.151.1 the account is considered part of the state treasury. In fact, section 411.1,31.2 authorizes the legislature to transfer money from the general revenue fund to the grain inspection fee fund as needed "to enable the director to continue operations[.]" Furthermore, no expenditures could be made from the grain inspection fee fund until after the money was appropriated by the legislature. § 411.151.1.

The grain inspection fee fund is also subject to several restrictions under state and federal law. Under section 411.151.1, the money in the fund is restricted "for the payment of salaries and expenses . . . necessary for carrying out the provisions consistent with the grain inspection and weighing services of [the Grain Warehouse Law.]" The Grain Standards Act further forbids the Division from using "any moneys collected pursuant to the charging of fees for any purpose other than the maintenance of the official inspection operation or other agricultural programs operated by the state or local governmental agency." 7 U.S.C. § 79(f)(1)(A)(vi).

In summary, section 411.151 makes clear that money in the grain inspection fee fund is part of the state treasury. They money in the fund is restricted by both state and federal law and cannot be expended without appropriation by the state legislature. See Dover Elevator Co. v. Arkansas State Univ., 64 F.3d 442, 447 (8th Cir. 1995) (university which could not spend money unless appropriated by state assembly was entitled to Eleventh Amendment immunity); Hadley, 76 F.3d at 1441 (Eleventh Amendment immunity extended to college when its daily operations were dependent upon state treasury). Because any judgment would ultimately come out of state funds, the officials are entitled to Eleventh Amendment immunity.

III. Conclusion

We reverse the denial of immunity for the officials in their individual and official capacities, and remand Hopkins' claim for equitable relief for further proceeding. See Treleven v. Univ. of Minnesota, 73 F.3d 816, 819 (8th Cir. 1996) (state official may be sued in official capacity for prospective injunctive relief); Grantham v. Trickey, 21 F.3d 289, 295 (8th Cir. 1`994) (qualified immunity does not bar plaintiff's equitable claim for reinstatement).

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT FOR THE WESTERN DISTRICT OF MISSOURI - CENTRAL DIVISION

TOMMY D. HOPKINS,	)	
	)	
Plaintiff,	)	
	)	
vs	)	No. 94-4458-CV-C-5
	)	
JOHN L. SAUNDERS, et al.,	)	
	)	
Defendants.	)	

Order

Before this Court are defendants' Motion to Dismiss or, in the alternative, for Summary Judgment and plaintiff's response. For the following reasons defendants' motion is granted in part and denied in part.

Background

Plaintiff, Tommy D. Hopkins, brings the above cause against John L. Saunders, Kyle Vickers, Charles Ausfahl, Roy Temple, and Beth M. Wheeler in their individual and official capacities alleging violations of due process and Missouri's whistleblower statute. On June 10, 1994, Hopkins was fired as Director of the Division of Grain Inspection and Warehousing (Division) of the Missouri Department of Agriculture (Department), a position he had held for thirteen years. Hopkins received no notice or hearing prior to termination. Hopkins filed a Notice of Appeal with the Agriculture Personnel Review Board (APRB) on June 30, 1994. This board was created pursuant to a 1978 Executive

order by the governor of Missouri calling for the establishment of a personnel administration system based on merit for the Division.

In response, the Department informed Hopkins that the APRB no longer existed and that the merit system plan was "void and inoperative." Hopkins next filed a Petition for Review in the Circuit Court of Cole County seeking review of the Department's response. That petition for review was later dismissed at Hopkins' suggestion. Additionally, in an attempt to preserve any appeal rights, Hopkins filed a Notice of Appeal with the state Personnel Advisory Board (PAB), a board that hears appeals of merit system employee dismissals. Defendants challenged the PAB's jurisdiction by filing a motion to dismiss which was denied. As a result, Defendants filed a Petition for Writ of Prohibition in the Cole County Circuit Court seeking to prohibit the PAB from proceeding with an evidentiary hearing. A hearing, however, was conducted solely to determine what personnel provisions applied to Hopkins. Both Hopkins and the Department then asked for the PAB to dismiss the case on different grounds. Hopkins maintained that the PAB had no jurisdiction over the case because he was covered by the plan created in compliance with the Executive Order, and therefore, the APRB had proper jurisdiction. The Department claimed that the PAB was the right forum but that the Missouri Merit System Law removed division directors from protection.

The PAB dismissed the case on the grounds set forth by Hopkins. They found that the Department had adopted the PAB's procedures for its regular employees but not for directors. In addition, the PAB found that the Department had established appeal procedures similar to those afforded merit employees pursuant to the Executive Order and that any appeal was to be presented to the APRB.

The Department appealed the PAB's findings by filing suit in the Circuit Court of Cole County. The Circuit Court dismissed the Department's petition for review as moot because the Department had received a dismissal as it had requested.

This Court originally granted Defendants' motion to dismiss on abstention grounds, choosing to "permit state courts to try state cases free from interference by federal courts." Younger v. Harris, 401 U.S. 36, 43, 91 S.Ct. 746, 750, L.Ed.2d 669 (1971). However, since the state courts have refused to hear this case, the cause must be dealt with by this Court.

Standard

A motion for summary judgment should be granted if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c) ; Rafos v. Outboard Marine Corp., 1 F. 3d 707, 708 (8th Cir. 1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986)). A defendant who moves for summary judgment has the burden of showing that there is no genuine issue of fact for trial. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). A plaintiff opposing a properly supported motion for summary judgment, however, may not rest upon the allegations of his pleadings, "but must set forth specific facts showing that there is a genuine issue for trial." Id.

Analysis

I. Statutes

In bringing this motion, Defendants first assert that Hopkins is not entitled to remedy as a matter of Missouri law. Defendants maintain that the Executive Order system, the APRB, was superseded either by the enactment of the State Merit System Law or by the subsequent adoption by the Department of its appeals process. Under the Merit System Law, for agencies covered by the statute, Division Directors of merit agencies are expressly excluded from the merit system. Mo. Ann. Stat. § 36.030 (Vernon 1994). This Court holds that Hopkins is not subject to the Merit System Law because of both collateral estoppel and the supremacy of the federal Grain Standards Act.

A. The Enactment of Chapter 36

After examining Chapter 36, Missouri's Merit System Law, this Court cannot say as a matter of law that Chapter 36 was meant to include the Division at the time of its amendment in 1979. When a federal court is faced with a lack of controlling state judicial authority, it must determine the law as the state court would determine it, guided by reason and sound judicial analysis. Morton v. Texas Welding And Manufacturing Co., 408 F.Supp. 7, 10 (S.D.Tex. 1976). The primary rule of statutory construction is to ascertain the intent of the legislature from the language used and to give effect to that intent if possible. Wolff Shoe Co. v. Director of Revenxie, 762 S.W.2d 29, 31 (Mo. banc 1988). Words must be accorded their plain and ordinary meaning, id,, and, if the wording of a statute is plain, simple, and straightforward, it is appropriate to assume that the ordinary meaning of those words accurately expresses the legislative purpose. United States v. Jones, 811 F.2d 444, 447 (8th Cir. 1987). While the first source in determining legislative intent is to examine the

words used in the statute, a proper analysis also considers the context in which the words are used. Fowler v. Director of Revenue, 823 S.W.2d 134, 135 (Mo. Ct. App. 1992).

Section 36.030 of the Merit System Law, which lists those governmental units included in the act's coverage, fails to explicitly name the Division or the Department while specifically naming many other governmental units at the division level or smaller.[1] The fact that the Executive Order was issued in order to comply with federal standards shows that the government was well aware that Division needed to have a merit system. This court finds that had the legislature intended for Division to be included under the State Personnel Law, it would have specifically named it.

Defendants contend that the Division was included through the catch-all provision at the end of the section, " . . . and such other agencies as may be required to maintain personnel standards on a merit basis by federal law or regulation for grant-in-aid programs." Mo. Ann. Stat. § 36.030(l). However, the Division received no grant money and cannot be considered a "grant-in-aid program" within the plain meaning of the statute.

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[1] A system of personnel administration based on merit principles and designed to secure efficient administration is established for all offices, positions and employees, except attorneys, of the department of social services, the department of corrections, the department of health , the department of natural resources, the department of mental health, the personnel division and other divisions and units of the office of administration, the division of employment security of the department of labor and industrial relations, the division of industrial inspection, the tourism commission, environmental improvement authority, Missouri housing development commission, the Missouri state water patrol, the Missouri veterans commission, such other agencies as may be designated by law, and such other agencies as may be required to maintain personnel standards on a merit basis by federal law or regulation for grant-in-aid programs." Mo. Ann. Stat. §36.030 (1994)

Furthermore, both the executive and judicial branches of Missouri have interpreted the statute as not including the Division as a merit agency under its coverage. On November 13, 1979, the director of the Department signed a cooperative agreement with the United States Department of Agriculture stating that personnel in the Division were covered by the Executive Order plan rather than Chapter 36; this was over three months after Chapter 36 had taken effect. This agreement had also been approved by the Missouri Attorney General.

Moreover, the Missouri Court of Appeals ruled in Brown v. Personnel Advisory Bd. of State of Mo., 879 S.W.2d 581 (Mo. Ct. App. 1994), that the Department was a non-merit agency that had adopted the appeals procedure of Chapter 36 for at least some of the personnel of the Division on April 22, 1981. If the Department had this option at that time, it necessarily follows that the Division was not included in the original act.

B. Collateral Estoppel

Since this Court cannot rule as a matter of law that the Division was included as a merit agency within Chapter 36, the issue of which procedures the state of Missouri meant to apply to the Division turns on a factual determination of whether the Department later adopted Chapter 36 and to which personnel that adoption would apply. That issue has already been adjudicated before the PAB, and relitigation by this court is barred by collateral estoppel.

Title 28 U.S.C. § 1738 "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged." Kremer v. Chemical Const. Corp., 456 U.S. 461, 467, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982). Accordingly, federal courts have consistently

applied res judicata and collateral estoppel to causes of action and issues decided by state courts. Id. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties. Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979). So long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity." United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422, 86 S.Ct. 1545, 1559, 16 L.Ed.2d 642 (1966) (citations omitted). When a federal court is bound by the statutory directive of §1738, state proceedings need do no more than satisfy the minimum requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for full faith and credit. Kremer, 456 U.S. at 482, 102 S.Ct. at 1897.

This Court then must first decide whether the courts of Missouri would give preclusive effect to the judgment of the PAB. Section 36.390(9) requires that a decision by the PAB be final and binding subject to appeal. Mo. Ann. Stat. §36.390(9). Further, collateral estoppel has been "applied by Missouri courts in situations where the fact issue was raised and decided in an administrative proceeding and relitigation later attempted in a circuit court action." Bresnahan v. May Dept. Stores Co., 726 S.W.2d 327, 329 (Mo. banc 1987).[2] In Bresnahan, the Missouri Supreme Court held that a decision by an appeals referee with the Appeals Tribunal of the Division of Employment Security determining that the

[2] See Butcher v. Ramsey, 628 S.W.2d 912, 914 (Mo.Ct.App. 1982), "the unappealed final administrative determination in a workman's compensation proceeding upon a fact issue within the jurisdiction of the administrative body is not subject to collateral attack and constitutes a bar to relitigation of the same fact issue in a subsequent common law action." (see also Scannell v. Fulton Iron Works Co., 289 S.W.2d 122 (1956).

plaintiff had tried to steal from her employer precluded the plaintiff from relitigating that fact in a civil trial in circuit court. 726 S.W.2d at 330. The court said that parties may not relitigate the issues raised and decided adversely to them in an administrative proceeding if those proceedings met a four-pronged test: 1) the issue decided was identical to the issue presented in the present action; 2) the prior adjudication resulted in a judgment on the merits; 3) the party against whom collateral estoppel is asserted was a party to the prior adjudication; 4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. Id.,. at 330 (citing Oates v. Safeco Ins. Co. of Am., 583 S.W.2d 713, 719 (Mo. banc 1979)).

In the current cause, the parties are identical, and the issue is the same. The prior adjudication was held solely to determine the factual issue of what procedure had been adopted by the Department. That hearing resulted in a judgment for the plaintiff on the merits. This Court further finds that Defendants had a "full and fair opportunity" to litigate the issue. Both sides were afforded a chance to be heard and present evidence at a hearing. The hearing was held in front of a three person board and treated as a contested case. Section 36.390 required the PAB to use the official procedures and rules set out in Chapter 536 allowing parties to call and examine witnesses, to introduce exhibits, to cross-examine and impeach opposing witnesses, and rebut the evidence against them. Mo. Ann. Stat. § 536.070(2). Section 36.390(9) provides for judicial review for a party aggrieved by a final decision.

Since all four prongs of the test are met, Missouri courts would recognize the preclusive effect of the PAB's decision. That being the case, this court must next determine whether the PAB proceedings met the minimum requirements of the Fourteenth Amendment Due Process Clause. No single model of procedural fairness, let alone a

particular form of procedure, is dictated by the Due Process Clause. Mitchell v. W.T. Grant Co., 416 U.S. 600, 610, 94 S.Ct. 1895, 1901, 40 L.Ed.2d 406 (1974). The procedures afforded in the PAB appeals process are virtually identical to those held to be sufficient in Kremer. 456 U.S. at 484, 102 S.Ct. at 1898. The state was allowed to submit all exhibits and the testimony of any witnesses, to rebut the evidence submitted by Hopkins, and allowed to be represented by counsel. Judicial review was allowed to extend to a determination of whether the action of the PAB:

(1) Is in violation of constitutional provisions;
(2) Is in excess of the statutory authority or jurisdiction of the agency;
(3) Is unsupported by competent and substantial evidence upon the whole record;
(4) Is, for any reason, unauthorized by law;
(5) Is made upon unlawful procedure or without fair trial;
(6) Is arbitrary, capricious or unreasonable;
(7) Involves an abuse of discretion.

Mo. Ann. Stat. § 536.140(2).[3] The procedures provided certainly satisfied the requirements of the Due Process Clause. As Defendants have been afforded a full and fair opportunity to litigate this factual issue of whether the Department adopted the PAB procedure for Division, its relitigation is barred by collateral estoppel.

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[3] This Court has no appellate jurisdiction over the decision by the Missouri circuit court to dismiss the state's appeal. Federal courts, with the exception of the United States Supreme Court, do not possess appellate jurisdiction over state court proceedings. Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 296, 90 S.Ct. 1739, 1747, 26 L.Ed. 362 (1923) (district courts may not exercise appellate jurisdiction over state courts); Williams v. McKenzie, 834 F.2d 152, 153 (8th Cir. 1987) (federal courts are not empowered to review state court proceedings even if a federal claim has been asserted therein).

C. The Supremacy Clause and the Grain Standards Act

Defendants' position that Hopkins was removed from the merit system as a matter of Missouri law is further flawed because such an action would be counter to the Grain Standards Act and void under the Supremacy Clause. Defendants stated that following the passage of the 1976 Grain Standards Act the "Division was required to maintain a merit personnel system." (Defs. Supp. at 20). This Court agrees with the parties on this point. Congress may, pursuant to its power to regulate Commerce, U. S. Const. Art. 1 §8, prohibit state regulation in the same area. United States v. City of St. Louis, 452 F. Supp. 1147, 1150 (1978). State laws can be preempted by federal regulations as well as federal statutes. Hillsborough County, Fla. v. Auto. Med. Labs., 471 U.S. 707, 714, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). "State law is preempted where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" English v. Gen. Elec. Co., 496 U.S. 72, 80, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990) (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)).

It is axiomatic that congressional intent is the guidepost to judicial interpretation of federal statutes. Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962); Kansas City, Mo. v. Fed. Pac. Elec. Co., 310 F.2d 271 (8th Cir.), cert. denied, 371 U.S. 912, 83 S.Ct. 256, 9 L.Ed.2d 171 (1962). The issue turns on the language of the statute and, where the language is not dispositive, on the intent of Congress as revealed in the history and purposes of the statutory scheme. See, Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980) ("the starting point for interpreting a statute is the language of the statute itself"); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95, 103 S.Ct. 2890, 2898, 77 L.Ed.2d 490 (1983) ("in deciding whether a

federal law pre-empts a state statute, our task is to ascertain Congress' intention in enacting the federal statute at issue").

As a general rule of statutory construction, where the terms of a statute are unambiguous, judicial inquiry is complete. Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981). The language of the Grain Standards Act, 7 U.S.C. §§ 71-87, and of the regulations promulgated thereunder are straight-forward and unambiguous with regard to "official personnel" of designated state agencies. The Act provides that state agencies are required to employ personnel on the basis of job qualification rather than political affiliation in order to be designated an "official agency" under the act. 7 U.S. C. §79 (f) (1) (A) (ix). Section 84(g) provides that the "the Secretary shall develop and effectuate standards for the recruiting, training, and supervising of official inspection personnel and appropriate work production standards for such personnel, which shall be applicable to . . . all state agencies under delegation of authority pursuant to this section." 7 U.S.C. § 84(g). These regulations promulgated by the Secretary of Agriculture clearly state that "state agencies shall employ official personnel on the basis of job qualification rather than political affiliation." 7 C.F.R. §800.196(g)(3)(ii).

"Official inspection personnel" means persons licensed or otherwise authorized by the Secretary pursuant to section 84 to perform all or specified functions involved in official inspection, official weighing, or supervision of weighing or supervision of official inspection. 7 U. S. C. §75 (j). The regulations define "official personnel" in the same way. 7 C.F.R. § 800.0(b)(70). Since Plaintiff was licensed by the Secretary of Agriculture to perform the above functions at the time of his dismissal, he qualifies as inspection personnel under the Act and the regulations, both of which

require the state to employ him based on personal qualifications rather than political affiliation.

Pre-emption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). One of the stated purposes of Congress in adopting the Grain Standards Act of 1976 was to "provide for the establishment of official United States standards for grain [and] to promote the uniform application thereof by inspection personnel." 7 U.S.C. §74. Legislative history almost solely reflects the concern that corruption and incompetence had permeated the grain grading system as it existed prior to 1976. S. Rep. No. 747, 94TH Cong., 2ND Sess. 1976, 1976 U.S.C.C.A.N. 6522, 1976 WL 14076 (Leg.Hist.), H.R. Conf. Rep. No. 1722, 94TH Cong., 2ND Sess. 1976, 1976 U.S.C.C.A.N. 6522, 1976 WL 14076 (Leg.Hist.). Obviously, one of Congress' objectives in requiring that "official personnel" be employed based on job qualification rather than political affiliation was to avoid the corruption and incompetence in the application of its grain standards which might arise if state agencies were allowed to operate in a patronage fashion. This Court cannot interpret this statute as allowing states to exclude from these standards the highest ranking manager in the officially designated state agency.

The Supremacy Clause dictates that any provision made by Missouri which allowed any "official personnel" to be employed on the basis of political affiliation would be void.

D. Missouri Statute § 105.055

Defendants next ask this court to dismiss Hopkins' claims under §105.055, Missouri's "Whistleblower" Statute,

for failure to state a case under which relief may be granted. As this statute has not yet been interpreted by Missouri case law, this Court must again determine the meaning of a Missouri statute. Once again, when a federal court is faced with a lack of controlling state judicial authority, it must determine the law as the state court would determine it, guided by reason and sound judicial analysis. Morton, 408 F. Supp. at 10. The primary rule of statutory construction is to ascertain the intent of the legislature from the language used and to give effect to that intent if possible. Wolff Shoe, 762 S.W.2d at 3. Words must be accorded their plain and ordinary meaning, Id., and, if the wording of a statute is plain, simple, and straightforward, it is appropriate to assume that the ordinary meaning of those words accurately expresses the legislative purpose. Jones, 811 F.2d at 447.

Section 105.055 is a "whistleblower" statute whose clear purpose is to encourage the reporting of wrong-doing and prohibit supervisors from firing underlings for making such reports. The Statute plainly states that "[n]o supervisor or appointing authority shall . . . take any disciplinary action whatsoever against a state employee . . . for the disclosure of information which the employee reasonably believes evidences a violation of any law, rule or regulation." Mo. Ann. Stat. § 105.055(2)(1).

Defendants claim that since § 105.055(l) applies only to disclosures to the state legislature or state auditor and since § 105.055(3) in part addresses issues relating to legislative requests, the entire statute applies only to reports made to the legislature or auditor. This Court cannot accept that interpretation. The language of subsection (1) protects employees discussing any aspect of agency operation with the state legislature or state auditor. Mo. Ann. Stat. § 105.055(l). Under Defendants' interpretation, subsection (2) would serve no purpose because violations of law and regulations certainly are already included within discussions

of the operations of the agency addressed in subsection (1). The legislature must be presumed not to enact meaningless provisions. Wollard v. City of Kansas City, 831 S.W.2d 200, 203 (Mo. banc 1992) (citing City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441,446 (Mo. banc 1980). Further, had the legislature intended to limit subsection (2) to disclosures made to the state legislature or state auditor it would have so specified, as it did in subsection (1). While the legislature and auditor might occasionally be appropriate forums for disclosure of violations of law and regulations, they certainly are not always the most appropriate or the most obvious to an employee wanting to report such activity. This Court cannot accept that the Missouri state legislature intended this legislation to be so neutered by such a limitation.

Defendants also claim that the termination of Hopkins was not a "disciplinary action" within the statute. The statute clearly defines "disciplinary action" as "any dismissal, demotion, transfer, reassignment, suspension, reprimand, warning of possible dismissal or withholding of work." Mo. Ann. Stat. § 105.055(4). Defendants contend that this definition only includes low level merit employees and that a "failure to reappoint" is not a dismissal or withholding of work. Once again this Court cannot agree with the defendant's interpretation. Viewing the evidence and inferences that can be drawn from it in the light most favorable to the plaintiff, a reasonable jury could conclude that Hopkins was terminated in retribution for reporting violations of regulations and the law within Division. This is exactly the type of retaliation that § 105.055 was enacted to prevent and is clearly a disciplinary action within the statute. Subsection (5) provides that "any employee" may file an appeal under the act. Mo. Ann. Stat. § 105.055(5). Even were Hopkins not required to be employed based on qualifications, this Court could not view his termination under these circumstances as falling outside the coverage of this statute.

The statute by its plain language applies to employees at all levels. To deny coverage to management personnel within the state government would be to deny coverage to those most likely to recognize when a law or regulation was being violated. This Court is not persuaded that that was the intent of the Missouri legislature.

Section 105.055(5) provides that appeals under the act be filed with the appropriate agency review board. As discussed above, collateral estoppel afforded the decision of the PAB dictates that the appropriate agency review board would be the APRB.[4] Defendants have claimed that this board does not exist, and thus barred the plaintiff from the hearing allowed him under §105.055. Viewing the evidence in the manner most favorable to the plaintiff, Defendants' refusal to allow Hopkins a hearing before the APRB could constitute a denial of Due Process and therefore be actionable under 42 U.S.C. S 1983. Defendants are not entitled to summary judgment as a matter of law on this issue.

II. 11th Amendment Immunity

Defendants have claimed that because they have been sued in their official capacity, they are entitled to Eleventh Amendment immunity[5] from the monetary awards requested by Hopkins.[6] In the absence of consent, a suit in which the

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[4] Even were the APRB not the appropriate forum and the PAB was, Hopkins might be entitled to a hearing under §105.055 because subsection (5) only adopts the appeals provisions of §36.390 which does not expressly exclude division directors. See, Laws v. Secretary of State, 895 S.W.2d 43 (Mo. Ct. App. 1995).

[5] Defendants have not claimed, and would clearly not be entitled to, sovereign immunity. Under Missouri law, a public entity is deprived of sovereign immunity when it performs a proprietary function. Johnson v. Bi-State Development Agency, 793 S.W.2d 864, 866 (Mo. Banc 1990).

[6] Defendant does not challenge the authority of this Court to grant injunctive relief. It is well-settled that "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their

State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.[7] See, e.g., Florida Dept. of Health v. Florida Nursing Home Assn., 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (per curiam); Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (per curiam). Certain well-established exceptions to Eleventh Amendment immunity have been established. A state may waive its sovereign immunity and consent to suit in federal court, or Congress may, by legislation, abrogate immunity without the state's consent in order to effectuate the provisions of the Fourteenth Amendment. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). This Court agrees with Defendants that neither of these exceptions is met in this case. Congress did not abrogate constitutional sovereign immunity when enacting § 1983 or the Grain Standards Act. See, Quern v. Jordan, 440 U.S. 332, 342, 99 S.Ct. 1139, 1146, 59 L.Ed.2d 358 (1979). As for waiver by the state, waiver can only be found where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Edelman v. Jordan, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662 (1974) (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909)). The Supreme Court added in Edelman that the "mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system

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future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury." Quern v. Jordan, 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 59 L.Ed.2d 358 (1979) (citations omitted).

[7] The eleventh amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. Const. amend. XI.

of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." Id., 415 U.S. at 673, 94 S.Ct. at 1361. This Court cannot find that Missouri intended to waive its Eleventh Amendment immunity. The fact that the Department agreed explicitly to obey federal law in administering the program can hardly be deemed an express waiver of Eleventh Amendment immunity. Florida Dept. of Health and Rehabilitative Serv., 450 U.S. 147, 149, 101 S.Ct. 1032, 1034, 67 L.Ed.2d 132 (1981).

However, when a suit is brought only against state officials, as is the case here, the court must decide whether the suit is actually one against the state. "When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Ford Motor Corp. v. Dept. of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945).

While the Eleventh Amendment bars private parties from suing a state in federal court, state-connected entities or subdivisions do not always share in their state's immunity. See, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280, 97 S.Ct. 568,,572, 50 L.Ed.2d 471 (1977). Courts considering an entity's claim of Eleventh Amendment immunity must determine "whether the suit is in reality a suit against the state." Sherman v. Curators of Univ. of Mo., 16 F.3d 860, 864 (8th Cir. 1994). (quoting Greenwood v. Ross, 778 F.2d 448, 453 (8th Cir. 1985)). In making this determination courts consider as a critical factor whether any judgment rendered against the entity would ultimately come out of state funds or whether a judgment could be paid out of non-state funds under the agency's discretionary control. Id, (citing Edelman V. Jordan, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662 (1974)).

Cases in other Circuits have examined this challenge to the Eleventh Amendment defense in Bowen and Schiff. Bowen v. Hackett, 387 F. Supp. 1212 (D.R.I. 1975), Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975). Bowen is an example of the careful scrutiny required to determine Eleventh Amendment issues. That case involved the question whether an order directing payments to be made from a state's Employment Security Fund and Temporary Disability Insurance Fund was barred by the Eleventh Amendment. In denying immunity, the District Court noted that the money in the funds was not a product of legislative appropriations but was revenue collected from a limited class of persons through an-administrative process and segregated from the general revenues of the state. Id. at 1220. Schiff involved the question whether a judgment against a state university for back pay to the plaintiffs who were wrongfully discharged from their positions as editors of the student paper was barred by the Eleventh Amendment. In that case, the Fifth Circuit found that the Eleventh Amendment did not bar recovery where the judgment could be paid from a fund generated by student activities fees which were collected for the purposes of operating the newspaper, including paying the salaries of the editors. Id. at 262. Hopkins claims that any award he received could be paid from a fund similar to those in Bowen and Schiff.

Hopkins has therefore called into dispute whether or not a monetary award would necessarily have to be paid from state funds. Sherman, 16 F.3d at 864. He has submitted evidence that Division is run in a corporate fashion and generates a profit. Indeed, the majority of grading and weighing conducted under the Grain Standards Act across the country is done by corporations rather than state agencies. The Division is clearly involved in interstate commerce and is authorized by the Missouri Legislature to operate outside the state of Missouri. Defendants have produced no evidence as to how much control the state actually exerts over

Division, which is largely controlled by federal regulation. Division receives no tax monies for its operations and generates a profit through fees charged to grain shippers and producers. Plaintiff claims that the monies generated through fees are held separately from the state treasury and that restrictions have been placed on their use. This Court holds that there is a dispute as to a material fact as to whether a damage award "must inevitably come from the general revenues of the State." Edelman v. Jordan, 415 U.S. at 665, 94 S.Ct. at 1357. Thus, it would be pre-mature to grant Eleventh Amendment immunity to Defendants at this time.

III. Qualified Immunity

Defendants have also claimed that they are entitled to qualified immunity. The standard for determining whether defendants are entitled to qualified immunity is well established. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 39 (1982). The Supreme Court has made it clear that a plaintiff cannot defeat an official's claim of qualified immunity "simply by alleging violation of extremely abstract rights." Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 3039, 97 L.Ed. 523 (1987). There must be a "particularized" showing that "a reasonable official would understand that what he is doing violates that right." Id. A court must first determine whether a violation of a constitutional right has been alleged; second, whether the alleged violation was clearly established; and third, whether given the facts most favorable to the plaintiff, there are no genuine issues of material fact as to whether a reasonable official would have known that the alleged actions violated

that right. Foulks v. Cole County, Mo., 991 F.2d 454, 456 (8th Cir. 1993).

Hopkins claims that Defendants denied him due process rights granted him by statutes and regulations. In order to avoid qualified immunity on the due process claims, a plaintiff must first show that he was deprived of a liberty or property interest within the meaning of the Fourteenth Amendment. The United States Supreme Court has recognized that "[t]o have a property interest in employment, a person must have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Typically, this property interest arises from regulatory or contractual limitations on the employer's ability to terminate an employee. Blankenbaker v. McCook Pub. Power Dist., 940 F.2d 384, 385 (8th Cir. 1991). When such a property interest exists, the employee is entitled to a hearing or some related form of due process prior to termination. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985).

As discussed in Part I of this Order, both the Grain Standards Act and the regulations complying with the governor's executive order provide that employees of the Division be employed on the basis of qualifications rather than political affiliation. The Division regulations promulgated under the Executive order provided for a pre-termination hearing. These regulations created a property interest for Hopkins in his employment. See, Bishop v. Wood, 426 U.S. 341, 345 n. 8, 96 S.Ct. 2074 n. 8, 48 L.Ed.2d 684 (1976) (because a [federal] employee could only be discharged for cause, he had a property interest which was entitled to constitutional protection) (citing Arnett, 416 U.S. at 151-152, 94 S.Ct. at 1642-1643).

That Hopkins was terminated is undisputed. That Hopkins received no process prior to or subsequent to his

termination is also conceded. Therefore, this Court holds that Hopkins has alleged a violation of an established right by the Defendants.

The only remaining issue that must be addressed then is whether "the contours of this right [are] sufficiently clear that a reasonable official would understand that what his is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The official is presumed to know the preexisting law governing his conduct, (see, Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738-39, 73 L.Ed.2d 396 (1982)), and his conduct is to be evaluated under the Harlow standard of " 'objective legal reasonableness' of the action . . ." assessed in light of the legal rules that were 'clearly established' at the time it was taken . . ." Anderson, 107 S.Ct. at 3038 [citations omitted]. The law is well established that employees with a property interest in their job are entitled to some due process. See, Loudermill, 470 U.S. at 542, 105 S.Ct. at 1493 (well-established law declares that a public employee with a constitutionally protected property interest in that employment is entitled to a pre-termination hearing consisting of notice and an opportunity to respond). While the specific procedures to be followed might have been debatable at the time of plaintiff's termination, the fact that he was entitled to some due process was well established under case law and the Grain Standards Act, both of which a reasonable official would have been aware. A reasonably competent director of a state department should be aware of federal laws governing the actions of his department. Jackson V. Rapp, 746 F. Supp. 934, 945 (W.D.Mo. 1990). This Court need not analyze the amount of process that should have been afforded in deciding this motion because it is undisputed that absolutely no process was afforded Hopkins, and some was certainly required. Accordingly, qualified immunity cannot be granted on this issue.

As established earlier in this order, Plaintiff was also entitled to a post-termination hearing under §105.055. This right was clearly established by statute. That statute requires that "each state agency shall prominently post a copy of this section in locations where it can reasonably be expected to come to the attention of all employees of the agency." Mo. Ann. Stat. §105.055(6). This Court holds that the meaning of that statute is clear and that any reasonable official would be aware of the rights it afforded to state employees. Accordingly, qualified immunity cannot be granted with respect to any of the defendants on this issue.

IV. Official Immunity

Defendants' make a footnote argument that they are entitled to official immunity. This Court finds this claim to be entirely without merit. The doctrine of official immunity is well established in Missouri law. Jackson v. City of Wentzville, 844 S.W.2d 585, 586 (Mo. Ct. App. 1993). The general rule of official immunity is that public officers acting within the scope of their authority are not liable for injuries arising from their discretionary acts or omissions, but may be held liable for torts committed when acting in a ministerial capacity. Kanagawa v. State, 685 S.W.2d 831, 835 (Mo. banc 1985). In this regard, it is commonly stated that where the law imposes on the officer the performance of ministerial duties in which a private individual has a special, direct, and distinctive interest, the officer is liable to such individual for any injury which he may proximately sustain in consequence of the failure to perform the duty at all, or to perform it properly. State ex rel. Twiehaus v. Adolf, 706 S.W.2d 443 (Mo. banc 1986). Whether an act is discretionary depends on whether the act "necessarily requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether an act should be done or a course pursued." Rustici v. Weidemever, 673 S.W.2d 762, 769 (Mo. banc 1984) (citation omitted). This is opposed to an

act that is ministerial, which an officer is required to perform in a prescribed manner, as mandated by legal authority, without regard to his own judgment. Id. at 769. In the present case, Defendants had no discretionary authority to do the acts alleged by the Plaintiff. Defendants were required by law to employ Hopkins on the basis of qualification rather than political affiliation. Defendants were obligated to provide Hopkins with a hearing under both department regulations and §105.055. In disregarding these requirements, Defendants have failed to perform ministerial functions and are not entitled to official immunity.

Moreover, official immunity as applied to § 1983 claims is not an absolute immunity, but a qualified immunity to which an official is not entitled unless his conduct was objectively reasonable with reference to clearly established law. Smith v. Copelenand, 892 F.Supp. 1218, 1225 (E.D.Mo. 1995) (citing Vieira v. Presley, 988 F.2d 850, 852 (8th Cir. 1993)). As stated earlier in this opinion, Defendants' alleged conduct was not objectively reasonable with reference to clearly established law, and thus Defendants are not entitled to official immunity.

V. The Public Policy Exception to the At-will Employment Doctrine and Contract Claims

Hopkins has failed to support his claims with regard to the public policy exception to the at-will employment doctrine and to his contract violation claims. He has not provided this Court with any case law or analysis with regard to these claims. Plaintiff fails to assert on his contract claim any standing to sue on those contracts. Defendants have properly challenged these claims in their motion for summary judgment. A plaintiff opposing a properly supported motion for summary judgment may not rest upon the allegations of his pleadings, "but must set forth specific facts showing that there is a genuine issue for trial." Id. As Plaintiff has failed to

show that there is a genuine issue for trial, summary judgment is granted to Defendants as it relates to these two claims.

VI. Sufficiency of the pleadings against defendants Wheeler, Temple and Ausfahl

Defendants also ask this Court to dismiss Plaintiff's claims against defendants Ausfahl, Temple, and Wheeler for failure to state a claim against them under § 1983. When considering a motion to dismiss, an assumption must be made that all the facts alleged in the complaint are true and a dismissal may be granted "only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." Alexander v. Peffer, 993 F.2d 1348, 1349 (8th Cir. 1993); Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982). A motion to dismiss should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle plaintiff to relief. Conley v. Gibson, 255 U.S. 41, 45-46 (1957).

Contrary to the Defendants' assertions, pleadings under the Federal Rules of Civil Procedure need not be specific. The Federal Rules of Civil Procedure require a short and plain statement of the claim showing that the pleader is entitled to relief. Fed.R.Civ.Pro. 8(a) (2). While "[d]amage actions against government officials are subject to a heightened standard of pleading with sufficient precision 'to put defendants on notice of the nature of the claims and enable them to prepare a response, ' " Brown v. Frey, 889 F. 2d 159, 170 (8th Cir. 1989) (citations omitted), cert denied, 493 U.S. 1088, 110 S.Ct. 1156, 107 L.Ed.2d 1059 (1990), Hopkins' pleadings were sufficient to place defendants Temple and Wheeler on notice of the nature of his claims.

Defendants are correct in asserting that "a defendant will not be held liable under 42 U.S.C. §1983 unless he was personally involved in causing the deprivation of a constitutional right or he either has or is charged with having actual knowledge that his subordinates are causing deprivations of constitutional rights." Triplett v. Azordegan, 570 F.2d 819, 823 (8th Cir. 1978). However, Plaintiff alleges that Temple and Wheeler had supervisory authority over Saunders and Vickers and that they actively approved Hopkins' firing and the subsequent denial of his hearing. Plaintiff further alleges that Temple and Wheeler had actual knowledge that his constitutional rights were being denied. While these allegations will need to be proven at trial for Temple and Wheeler to be held liable, the pleadings are sufficient to place Defendants on notice, and this Court must deny Defendant's motion to dismiss Temple and Wheeler.

This Court does, however, grant defendants' motion to dismiss Plaintiff's complaint against defendant Ausfahl. To establish a claim under 42 U.S.C. §1983 two elements must exist. First, the plaintiff must have suffered the deprivation of federally protected rights, privileges or immunities as the result of action taken, and second, such deprivation must have been caused by a person acting under color of state law. Triplett v. Azordegan, 570 F.2d 819 (8th Cir. 1978) (citations omitted). To establish that an act was performed under color of state law, there must exist some authority vested by the state in the official to act in regard to the constitutional right of which appellant contends he has been denied. Id. (citing Potts v. Wright, 357 F. Supp. 215, 219 (E.D.Pa. 1973)). Hopkins has failed to allege any authority vested in defendant Ausfahl in regard to his constitutional rights. Ausfahl was Plaintiff's subordinate. Nowhere in his pleadings does Plaintiff allege that Ausfahl had any authority to fire him or to deny him a hearing. Nowhere does Plaintiff allege any action by Ausfahl which caused Plaintiff to be denied due process.

Plaintiff has also made a civil conspiracy claim against Ausfahl. A claim of civil conspiracy to violate a person's constitutional rights is actionable under §1983. Putman v Gerloff, 701 F.2d 63, 65 (8th Cir. 1983); Simpson v. Weeks, 570 F.2d 240, 242-43 (8th Cir. 1978), cert. denied, 443 U.S. 911 (1979). The doctrine of civil conspiracy extends liability for a tort, here the deprivation of a constitutional right, to persons other than the actual wrongdoer. A plaintiff must, however, plead two separate elements to state a claim of civil conspiracy under §1983. First, a plaintiff must allege with "sufficient particularity" and demonstrate with "specific material facts" that the defendants reached some agreement or mutual understanding and conspired together to violate one of plaintiff's constitutional rights. Nelson v. City of McGehee, 876 F.2d 56, 59 (8th Cir. 1989); Gometz v. Culwell, 850 F.2d 461, 464 (8th Cir. 1988); Myers v. Morris, 810 F.2d 1437, 1454 (8th Cir. 1987), cert. denied, 108 S.Ct. 97 (1987). Second, the plaintiff must allege an overt act performed by one of the co-conspirators that results in damage. Gometz, 850 F.2d at 464. While Hopkins has satisfied this latter requirement, he has failed to allege with sufficient particularity facts suggesting that defendant Ausfahl reached an agreement or mutual understanding with any of the other defendants to violate his due process rights. Hopkins' conspiracy allegations are vague and conclusory. Even viewing the allegations set out in the pleadings in the light most favorable to Hopkins, this Court is convinced that he has failed to state a claim upon which relief can be granted and that defendant Ausfahl is entitled to dismissal of the complaint against him.

Conclusions

Assuming the allegations of Plaintiff to be true, Plaintiff has failed to state a case under which relief may be granted as against defendant Ausfahl. With regard to defendants Temple and Wheeler, this court determines that

Plaintiff has alleged a set of facts which could entitle him to relief. As to Defendants' motion for summary judgment, genuine issues of material fact remain, and defendant is not entitled judgment as a matter of law.

Accordingly, it is hereby

ORDERED that defendant Ausfahl's supplemental motion to dismiss (doc. #8) (re-instated by doc. #44) is granted. It is further

ORDERED that Defendants' motion to dismiss defendants Temple and Wheeler (doc. #44) is denied. It is further

ORDERED that Defendants' motion for summary judgment (doc. #44) is granted with regard to Plaintiff's claim as to the public policy exception to the at-will employment doctrine and with regard to Plaintiff's contract claims. It is further

ORDERED that the remainder of Defendants' motion for summary judgment (doc. #44) is denied. It is further

ORDERED that Defendants' motion for continuance (doc. #68) is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

January 9, 1996.

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

TOMMY D. HOPKINS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	CV 194-1028CC
MISSOURI DEPARTMENT OF AGRICULTURE,	)	
	)	
	)	
Defendant.	)	

JUDGMENT

This is a proceeding seeking review of an administrative proceeding before the Missouri Department of Agriculture, concerning the Plaintiff's dismissal from his employment. This action is brought pursuant to the provisions of Chapter 536, RSMo, specifically §§536.110, et seq. After reviewing the record and hearing arguments of counsel, the Court finds that Plaintiff Tommy D. Hopkins was not afforded a hearing before he was dismissed on June 10, 1994, as the Director of the Division of Grain Inspection and Warehousing, Missouri Department of Agriculture, and that he has not received any hearing since his dismissal. Plaintiff filed an appeal with the Agriculture Personnel Review Board (in care of the Director of the Department of Agriculture) in reliance on an Executive Order issued by Governor Joseph P. Teasdale on February 1, 1973 and pursuant to §105.055, RSMo. Plaintiff was advised by an attorney for the Defendant Department of Agriculture that no

such board existed and that the appeal procedure Plaintiff sought to invoke was "void and inoperative." In the absence of any hearing, there is no record for this Court to review. This Court has no authority to now conduct an evidentiary hearing and therefore is without jurisdiction to grant Plaintiff any relief sought, and finds that Plaintiff has exhausted his available remedies in this matter. Defendant has moved for dismissal. Therefore, it is

ORDERED that Plaintiffs Petition for Review be and is hereby dismissed as requested by Defendant for the reasons stated hereinabove.

Costs taxed to Plaintiff.

SO ORDERED this 4th day of May, 1995.

/s/ Byron L. Kinder
BYRON L. KINDER, CIRCUIT JUDGE

BEFORE THE
PERSONNEL ADVISORY BOARD
STATE OF MISSOURI

TOMMY D. HOPKINS 3732 ROCK RIDGE ROAD JEFFERSON CITY MO 65109 APPELLANT, v.	)	CASE NO. NM95-001
JOHN SAUNDERS, DIR. DEPARTMENT OF AGRICULTURE 1616 MISSOURI BOULEVARD JEFFERSON CITY MO 65101 APPOINTING AUTHORITY.	)	

ORDER DISMISSING APPEAL

This case is the appeal by Tommy D. Hopkins of his dismissal from his position as Director, Division of Grain Inspection and Warehousing, by the Department of Agriculture effective June 10, 1994. In his filing with the Personnel Advisory Board on July 8, 1994, the Appellant asserted that he had rights to appeal to the Board from that dismissal under 36.390, RSMo 1986, and under 105.055, RSMo 1986.

The Board, by its Hearing Officer, Gene W. Spitzmiller, held a hearing on September 21, 1994, in Jefferson City, Missouri. Prior to the hearing the Hearing Officer restricted the presentation of evidence to the following issues: a) Whether or not the Department of Agriculture, a non merit agency, had adopted the Board's

appeal procedures, under 36.390.7, RSMo 1986, for employment dismissals from the Appellant's former position, and b) Whether or not the Department of Agriculture had established appeal procedures substantially similar to those provided for merit employees under 36.390.5, RSMo 1986. Jerry Venters, counsel, represented the Appellant, who was present. June Doughty, counsel and John Saunders, the Appointing Authority, were present.

After considering all the evidence, the Board finds that the competent and substantial evidence, the evidence as a whole, and the preponderance thereof, does not support a finding that the Department of Agriculture had adopted the Board's appeal procedures, under 36.390.7, RSMo 1986, for dismissals from the position of Director, Division of Grain Inspection and Warehousing. The Department of Agriculture had adopted the Board's appeal procedures for dismissals of regular employees in most positions of the Division of Grain Inspection and Warehousing but had not adopted the Board's appeal procedures for the Director and other excepted positions.

The Board also finds that the Department of Agriculture, in compliance with an Executive Order of the Governor that was filed with the Missouri Secretary of State in 1978, established appeal procedures for all regular employees of the Division of Grain Inspection and Warehousing substantially similar to those afforded merit employees under 36.390.5, RSMo 1986. Those appeal procedures, although infrequently used during the interim period, still existed in force and effect at the time of the Appellant's dismissal. The appeal procedures applied to dismissals of regular employees of the Division of Grain Inspection and Warehousing holding positions excepted from the adoption of the Board's appeal procedures.

Section 36.390.7, RSMo 1986, provides in part:

"7. The provisions for appeals provided in subsection 5 for dismissals of regular merit employees may be adopted by nonmerit agencies of the state for any or all employees of such agencies."

Section 105.055., RSMo 1986, as amended, provides in part:

"5. Any employee may file an administrative appeal whenever the employee alleges that disciplinary action was taken against the employee in violation of this section. The appeal shall be filed with the state personnel advisory board; provided that the appeal shall be filed with the appropriate agency review board or body of nonmerit agency employers which have established appeal procedures substantially similar to those provided for merit employees in subsection 5 of section 36.390, RSMo."

Since the Department of Agriculture had not adopted the Board's appeal procedures under 36.390.7, RSMo 1986, for dismissals of the Director, Division of Grain Inspection and Warehousing, the Board concludes that it has no authority under Chapter 36, RSMo 1986, to hear the Appellant's appeal.

The Board concludes that it could hear the Appellant's asserted cause for action arising under 105.055, RSMo 1986, as amended, only if the Department of Agriculture had not established appeal procedures substantially similar to those procedures provided for merit employees in 36.390, RSMo 1986. The Board considered the arguments presented by the Department of Agriculture that the Executive Order in 1978 and the procedures established by the Department of Agriculture thereafter did not support the Appellant's cause for action because the procedures were not promulgated as rules pursuant to Chapter 536, RSMo

1986. The Board concludes, however, that the procedures so established were valid for internal management of employee appeals arising by authority of 105.055, RSMo 1986, as amended, even if they were insufficient by themselves to grant to the Appellant a legal right of appeal. Therefore, the appropriate review board or body identified by the Department of Agriculture's established procedures has the authority to receive and hear the Appellant's appeal, and the Board has no such authority under 105.055, RSMo 1986, as amended. Since the Board has no jurisdiction to hear the appeal under 36.390, RSMo 1986, or under 105.055, RSMo 1986, as amended, the appeal should be dismissed.

ORDER

IT IS, THEREFORE, THE ORDER OF THE BOARD that the appeal of Tommy D. Hopkins, in this matter be, and is, hereby dismissed.

DATED: October 18,1994

/s/ Milton P. Goldfarb
MILTON P. GOLDFARB, CHAIRMAN

/s/ Judy A. Hawkins
JUDY A. HAWKINGS, MEMBER

/s/ Gail E. Sphar
GAIL E. SPHAR, MEMBER

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Constitution: First Amendment: Article I.
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution: Fifth Amendment: Article V.
No person shall . . . . be deprived of life, liberty, or property, without due process of law; . . . .

U.S. Constitution: Eleventh Amendment. Article XI.
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Constitution: Fourteenth Amendment: Article XIV.
Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

7 U.S.C. Sec. 74. Congressional findings and declaration of policy.

(a) Grain is an essential source of the world's total supply of human food and animal feed and is merchandised in interstate and foreign commerce. It is declared to be the policy of the Congress, for the promotion and protection of such commerce in the interests of producers, merchandisers, warehousemen, processors, and consumers of grain, and the general welfare of the people of the United States, to provide for the establishment of official United States standards for grain, to promote the uniform application thereof by official inspection personnel, to provide for an official inspection system for grain, and to regulate the weighing and the certification of the weight of grain shipped in interstate or foreign commerce in the manner hereinafter provided; with the objectives that grain may be marketed in an orderly and timely manner and that trading in grain may be facilitated. It is hereby found that all grain and other articles and transactions in grain regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce and that regulation thereof as provided in this chapter is necessary to prevent or eliminate burdens on such commerce and to regulate effectively such commerce.

7 U.S.C. Sec. 79. Official inspection.

(a) Grain required to be officially inspected.

The Secretary is authorized to cause official inspection under the standards provided for in section 76 of this title to be made of all grain required to be officially inspected as provided in section 77 of this title, in accordance with such regulations as the Secretary may prescribe.

(b) Inspections made pursuant to request of interested persons.

The Secretary is further authorized, upon request of any interested person, and under such regulations as the Secretary may prescribe, to cause official inspection to be made with respect to any grain whether by official sample, submitted sample, or otherwise within the United States under standards provided for in section 76 of this title, or, upon request of the interested person, under other criteria approved by the Secretary for determining the kind, class, quality, or condition of grain, or other facts relating to grain, whenever in the judgment of the Secretary providing such service will effectuate any of the objectives stated in section 74 of this title.

* * * * * * *

(f) Official inspections at other than export port locations; designation of agencies or persons to conduct official inspections

(1) With respect to official inspections other than at export port locations, the Secretary is authorized, upon application by any State or local governmental agency, or any person, to designate such agency or person as an official agency for the conduct of all or specified functions involved in official inspection (other than appeal inspection) at locations where the Secretary determines official inspection is needed, if -

(A) the agency or person shows to the satisfaction of the Secretary that such agency or person -

(i) has adequate facilities and qualified personnel for the performance of such official inspection functions;

(ii) will provide for the periodic rotation of official inspection personnel among the grain elevators, warehouses, or other storage or handling facilities at which the State or

person provides official inspection, as is necessary to preserve the integrity of the official inspection service;
(iii) will meet training requirements and personnel standards established by the Secretary under section 84(g) of this title;
(iv) will otherwise conduct such training and provide such supervision of its personnel as are necessary to assure that they will provide official inspection in accordance with this chapter and the regulations and instructions thereunder;
(v) will not charge official inspection fees that are discriminatory or unreasonable;
(vi) if a State or local governmental agency, will not use any moneys collected pursuant to the charging of fees for any purpose other than the maintenance of the official inspection operation of the State or local governmental agency;
(vii) and any related entities do not have a conflict of interest prohibited by section 87 of this title;
(viii) will maintain complete and accurate records of its organization, staffing, official activities, and fiscal operations, and such other records as the Secretary may require by regulation;
(ix) if a State or local governmental agency, will employ personnel on the basis of job qualifications rather than political affiliations;
(x) will comply with all provisions of this chapter and the regulations and instructions thereunder; and
(xi) meets other criteria established in regulations issued under this chapter relating to official functions under this chapter; and

(B) the Secretary determines that the applicant is better able than any other applicant to provide official inspection service.

(2) Not more than one official agency or State delegated authority pursuant to subsection (e)(2) of this section for carrying out the inspection provisions of this chapter shall be operative at one time for any geographic area as determined by the Secretary to effectuate the objectives stated in section 74 of this title, except that the Secretary may conduct pilot programs to allow more than 1 official agency to carry out inspections within a single geographical area without undermining the policy stated in section 74 of this title.

(3) Except as authorized by the Secretary, no official agency or State delegated authority pursuant to subsection (e)(2) of this section shall officially inspect under this chapter any official or other sample drawn from a lot of grain and submitted for inspection unless such lot of grain is physically located within the geographic area assigned to the agency by the Secretary at the time such sample is drawn.

(4) No State or local governmental agency or person shall provide any official inspection for the purposes of this chapter except pursuant to an unsuspended and unrevoked delegation of authority or designation by the Secretary, as provided in this section, or as provided in section 84(a) of this title.

(g) Termination, renewal, amendment, cancellation, and revocation of designations of official agencies

(1) Designations of official agencies shall terminate at such time as specified by the Secretary but not later

than triennially and may be renewed in accordance with the criteria and procedure prescribed in subsection (f) of this section.

(2) A designation of an official agency may be amended at any time upon application by the official agency if the Secretary determines that the amendment will be consistent with the provisions and objectives of this chapter; and a designation will be cancelled upon request by the official agency with ninety days written notice to the Secretary. A fee as prescribed by regulations of the Secretary shall be paid by the official agency to the Secretary for each such amendment, to cover the costs incurred by the Secretary in connection therewith, and it shall be deposited in the fund created in subsection (j) of this section.

(8) The Secretary may revoke a designation of an official agency whenever, after opportunity for hearing is afforded the agency, ...

7 U.S.C. Sec. 84.(g) Recruitment, training, and supervision of personnel; work production standards; exemption for certain personnel.

The Secretary shall develop and effectuate standards for the recruiting, training, and supervising of official inspection personnel and appropriate work production standards for such personnel, which shall be applicable to the Secretary, all State agencies under delegation of authority pursuant to this chapter, and all official agencies and all persons licensed or authorized to perform functions under this chapter.

7 U.S.C. Sec. 87f. Enforcement provisions
(h) District court jurisdiction. The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories and possessions of the United States shall have jurisdiction in cases arising under this chapter.

28 U.S.C. Sec. 1254. Courts of appeals; certiorari; certified questions.
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

28 U.S.C. Sec. 1738. State and Territorial statutes and judicial proceedings; full faith and credit .
The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. Sec. 1746. Unsworn declarations under penalty of perjury.

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

* * * * * *

(4) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

42 U.S.C. Sec. 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For

the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Sec. 1988. Proceedings in vindication of civil rights.

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees.

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title,, [1] the court, in its discretion, may allow the prevailing party, other than

the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

42 U.S.C. Sec. 2000e. Definitions.

For the purposes of this subchapter –

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from

taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal Saff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 et seq.), and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands,

American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.).

* * * * * *

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

* * * * * *

(m) The term "demonstrates" means meets the burdens of production and persuasion.

42 U.S.C. Sec. 2000e-2. Unlawful employment practices.

(a) Employer practices.

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. Sec. 2000e-3. Other unlawful employment practices.

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

7 CFR Sec. 800.0 Meaning of terms.

(a) Construction. Words used in the singular form shall be considered to imply the plural and vice versa, as appropriate. When a section; e.g., Sec. 800.2, is cited, it refers to the indicated section in these regulations.

(b) Definitions. For the purpose of these regulations, unless the context requires otherwise, the following terms shall have the meanings given for them below. The terms defined in the Act have been incorporated herein for easy reference.

(1) Act. The United States Grain Standards Act, as amended (39 Stat. 482-485, as amended 7 U.S.C. 71 et seq.).

* * * * * *

(3) Administrator. The Administrator of the Grain Inspection, Packers and Stockyards Administration or any person to whom authority has been delegated.

(4) Agency. A delegated State or an official agency designated by the Administrator, as appropriate.

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(11) Assigned area of responsibility. A geographical area assigned to an agency or to a field office for the performance of official inspection or Class X or Class Y weighing services.

* * * * * *

(21) Compliance. Conformance with all requirements and procedures established by statute, regulation, instruction, or directive so that managerial, administrative, and technical functions are accomplished effectively. Compliance functions include: evaluating alleged violations, initiating preliminary investigations; initiating implementation of all necessary corrective actions; conducting management and technical reviews; administering the designation of agencies and the delegation of State

agencies to perform official functions; identifying and, where appropriate, waiving and monitoring conflicts of interest; licensing agency personnel; responding to audits of FGIS programs; and reviewing and, when appropriate, approving agency fee schedules.

* * * * * *

(29) Department of Agriculture and Department. The United States Department of Agriculture (USDA).

(30) Designated agency. A State or local governmental agency, or person, designated under the Act to provide either official inspection service, or Class X or Class Y weighing services, or both, at locations other than export port locations.

* * * * * *

(34) Employed. An individual is employed if the individual is actually employed or the employment is being withheld pending issuance of a license under the Act.

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(46) Instructions. The Notices, Instructions, Handbooks, and other directives issued by the Service.

* * * * * *

(48) Interstate or foreign commerce. Commerce from any State to or through any other State, or to or through any foreign country.

(49) Licensee. Any person licensed by the Service.

* * * * * *

(59) Official agency. Any State or local government agency, or any person, designated by the Administrator pursuant to subsection (f) of section 7 of the Act for the conduct of official inspection (other than appeal inspection), or subsection (c) of section 7A of the Act for the conduct of Class X or Class Y weighing (other than review of weighing).

* * * * * *

(70) Official personnel. Persons licensed or otherwise authorized by the Administrator pursuant to Section 8 of the Act to perform all or specified functions involved in official inspection, Class X or Class Y weighing, or in the supervision of official inspection, or Class X or Class Y weighing.

* * * * * *

(82) Person. Any individual, partnership, corporation, association, or other business entity.

* * * * * *

(86) Regulations. The regulations in parts 800, 801, and 802 of this chapter.

* * * * * *

(90) Secretary. The Secretary of Agriculture of the United States or any person to whom authority has been delegated.

(91) Service. The Federal Grain Inspection Service of the Grain Inspection, Packers and Stockyards Administration of the United States Department of Agriculture.

* * * * * *

(99) State. Any one of the States (including Puerto Rico) or territories or possessions of the United States (including the District of Columbia).

* * * * * *

(101) Supervision. The effective guidance of agencies, official personnel and others who perform activities under the Act, so as to reasonably assure the integrity and accuracy of the program activities. Supervision includes overseeing, directing, and coordinating the performance of activities under the Act, reviewing the performance of these activities; and effecting appropriate action. FGIS supervisory personnel supervise agencies, official personnel and others who perform activities under the Act. Agency supervisors are responsible for the direct supervision of their own official personnel and employees. FGIS

provides oversight, guidance, and assistance to agencies as they carry out their responsibilities.

* * * * * *

(103) United States. The States (including Puerto Rico) and the territories and possessions of the United States (including the District of Columbia).

7 CFR Sec. 800.1 Mission.

The mission of the Federal Grain Inspection Service is to facilitate the marketing of grain, oilseeds, pulses, rice, and related commodities by:

(a) Establishing descriptive standards and terms,

(b) Accurately and consistently certifying quality,

(c) Providing for uniform official inspection and weighing,

(d) Carrying out assigned regulatory and service responsibilities, and

(e) Providing the framework for commodity quality improvement incentives to both domestic and foreign buyers.

7 CFR Sec. 800.196 Designations.

(a) General. Eligible persons or governmental agencies may be designated to perform official services (excluding appeal inspection) within a specified area (other than export port locations).

(b) Restrictions. (1) General. If official inspection services are performed in an area by a designated agency, Class X and Class Y weighing services in that area may be performed only by the designated agency if the agency applies for designation to provide weighing services and is found qualified by the Service. If the agency designated to provide official inspection services is found not qualified or does not apply, the Class X and Class Y weighing services

may be performed by another available agency that is found qualified and is designated by the Service, or the official services may be performed by the Service.

(2) Interim authority. (i) By agency. A designated agency may perform official services outside its assigned area on an interim basis when authorized by the Service.

(ii) By Service. Official inspection services and/or Class X and Class Y weighing services may be performed by the Service in an area (other than export port locations) on an interim basis in accordance with sections 7(h) and 7A(c) of the Act.

(c) Who can apply. Any State or local governmental agency or any person may apply, subject to sections 7 and 7A of the Act, to the Service for designation as an official agency to perform official inspection services (excluding appeal inspection) and/or Class X and Class Y weighing services in a given area (other than export port locations) in the United States.

(d) When and how to apply. An application for designation should be filed with the Service, according to the provisions of the Federal Register notice which requests applicants for designation to perform official services in existing or new geographic areas. The application for designation: (1) Shall be submitted on a form furnished by the Service; (2) shall be typewritten or legibly written in English; (3) shall show or be accompanied by documents which show all information requested on the form, or otherwise required by the Service; and (4) shall be signed by the applicant or its chief operating officer.

(e) Review of conditions and criteria for designation.

(1) Application. Each application for a designation shall be reviewed to determine whether it complies with paragraph (d) of this section. If an application is not in compliance, the applicant shall be provided an opportunity to submit the needed information. If the needed information is not submitted within a reasonable time, as determined by the Service, the

application may be dismissed. When an application is dismissed, the Service shall notify the applicant, in writing, of the reason(s) for the dismissal.

(5) Applicant. Each applicant for authority to operate as a designated agency shall be reviewed to determine whether the applicant meets the conditions and criteria contained in sections 7(f)(1)(A) and (B) of the Act, Sec. 800.199 of the regulations, and paragraph (g) of this section. The requested designation may be granted if the Service determines that:

(i) The requested action is consistent with the need for official services;

(ii) the applicant meets the conditions and criteria specified in the Act and regulations; and

(iii) the applicant is better able than any other applicant to provide official services.

(f) Area of responsibility.

(1) General. Each agency shall be assigned an area of responsibility by the Service. Each area shall be identified by geographical boundaries and, in the case of a State or local government, shall not exceed the jurisdictional boundaries of the State or the local government, unless otherwise approved by the Service. The area of responsibility may not include any export elevators at export port locations or any portion of an area of responsibility assigned to another agency that is performing the same functions. A designated agency may perform official services at locations outside its assigned area of responsibility only after obtaining approval from the Service.

(2) Amending. A request for an amendment to an assigned area of responsibility shall

(i) be submitted to the Service in writing;

(ii) specify the change desired;

(iii) be signed by the applicant or its chief operating officer; and

(iv) be accompanied by the fee prescribed by the Service. The assigned area may be amended if the Service determines that the amendment is consistent with the provisions and objectives of the Act, regulations, and instructions. Upon a finding of need, the Service may initiate action to change an assigned area of responsibility.

* * * * * * * *

(6) Staffing, licensing, and training.

(i) General. The agency shall employ sufficient personnel to provide the official services normally requested in an accurate and timely manner. Each agency shall only use personnel licensed by the Service for the performance of official services and shall train and assist its personnel in acquiring and maintaining the necessary skills. Each agency shall keep the Service informed of the employment status of each of its licensees and any substantial change in a licensee's duties.

(ii) State agencies. State agencies shall employ official personnel on the basis of job qualifications rather than political affiliations.

* * * * * * * *

(5) Supervision. The agency and its officials shall be responsible for the actions of the official personnel employed by the agency, for direct supervision of the daily activities of such personnel, and for the conduct of official services and related activities at the agency. The agency shall supervise official activities, in accordance with the Act, regulations, and instructions, and shall take action necessary to

ensure that its employees are not performing prohibited functions and are not involved in any action prohibited by the Act, regulations, or instructions. Each agency shall report to the responsible field office information which shows or may show a violation of any provision of the Act, regulations, or instructions and information on any instructions which have been issued to agency personnel by Service personnel or by any other person which are inconsistent with the Act, regulations, or instructions.

(h) Termination and renewal.

(1) Triennial.

(i) Termination. A designation shall terminate at a time specified by the Administrator, but not later than 3 years after the effective date of the designation. A notice of triennial termination shall be issued by the Service to a designated agency at least 120 calendar days in advance of the termination date. The notice shall provide instructions for requesting renewal of the designation. Failure to receive a notice from the Service shall not exempt a designated agency from the responsibility of having its designation renewed on or before the specified termination date.

(ii) Renewal. Designations may be renewed, upon application, in accordance with criteria and procedures for designation prescribed in section 7(f) of the Act and this section of the regulations. The Administrator may decline to renew a designation if:

(A) The requesting agency fails to meet or comply with any of the criteria for designation set forth in the Act, regulations, and instructions, of

(B) the Administrator determines that another qualified applicant is better able to provide official services in the assigned area.

MISSOURI CONSTITUTIONAL PROVISIONS

Missouri Constitution: Article I: Section 2.
Section 2. That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

Missouri Constitution: Article I: Section 8.
Section 8. That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts.

Missouri Constitution: Article I: Section 10.
Section 10. That no person shall be deprived of life, liberty or property without due process of law.

Missouri Revised Statutes: Chapter 36: Section 36.030 Personnel, administration of merit system--departments affected-- exemptions—employee suggestions, awards authorized.

36.030. 1. A system of personnel administration based on merit principles and designed to secure efficient administration is established for all offices, positions and employees, except attorneys, of the department of social services, the department of corrections, the department of health, the department of natural resources, the department of mental health, the division of personnel and other divisions and units of the office of administration, the division of employment security, mine safety and on-site consultation sections of the division of labor standards and administration operations of the department of labor and industrial relations, the division of tourism and job development and training, the Missouri housing development commission, and the office of public counsel of the department of economic development, the Missouri state water patrol, the Missouri veterans commission, capitol police and state emergency management agency of the department of public safety, such other agencies as may be designated by law, and such other agencies as may be required to maintain personnel standards on a merit basis by federal law or regulations for grant-in-aid programs; except that, the following offices and positions of these agencies are not subject to this chapter and may be filled without regard to its provisions:

(1) Other provisions of the law notwithstanding, members of boards and commissions, departmental directors, five principal assistants designated by the departmental directors, division directors, and three principal assistants designated by each division director; except that, these exemptions shall not apply to the division of personnel;

(2) One principal assistant for each board or commission, the members of which are appointed by the governor or by a director of the department;

(3) Chaplains and attorneys regularly employed or appointed in any department or division subject to this chapter, except as provided in section 36.031;

(4) Persons employed in work assignments with a geographic location principally outside the state of Missouri and other persons whose employment is such that selection by competitive examination and standard classification and compensation practices are not practical under all the circumstances as determined by the board by rule;

(5) Patients or inmates in state charitable, penal and correctional institutions who may also be employees in the institutions;

(6) Persons employed in an internship capacity in a state department or institution as a part of their formal training, at a college, university, business, trade or other technical school; except that, by appropriate resolution of the governing authorities of any department or institution, the personnel division may be called upon to assist in selecting persons to be appointed to internship positions;

(7) The administrative head of each state medical, penal and correctional institution, as warranted by the size and complexity of the organization and as approved by the board;

(8) Deputies or other policy-making assistants to the exempt head of each division of service, as warranted by the size or complexity of the organization and in accordance with the rules promulgated by the personnel advisory board;

(9) Special assistants as designated by an appointing authority; except that, the number of such special assistants shall not exceed one percent of a department's total authorized full-time equivalent workforce;

(10) Merit status shall be retained by present incumbents of positions identified in this section which have previously been subject to this chapter.

Missouri Revised Statutes: Chapter 36: Section 36.031 Applicability of merit system--director of personnel to notify affected agencies.

36.031. Any provision of law to the contrary notwithstanding, except for the elective offices, institutions of higher learning, the department of transportation, the department of conservation, those positions in the Missouri state highway patrol the compensation of which is established by subdivision (2) of subsection 2 of section 43.030, RSMo, and section 43.080, RSMo, and those positions for which the constitution specifically provides the method of selection, classification, or compensation, and the positions specified in subsection 1 of section 36.030, but including attorneys, those departments, agencies and positions of the executive branch of state government which have not been subject to these provisions of the state personnel law shall be subject to the provisions of sections 36.100, 36.110, 36.120 and 36.130, and the regulations adopted pursuant to sections 36.100, 36.110, 36.120 and 36.130 which relate to the preparation, adoption and maintenance of a position classification plan, the establishment and allocation of positions within the classification plan and the use of appropriate class titles in official records, vouchers, payrolls and communications. Any provision of law which confers upon any official or agency subject to the provisions of this section the authority to appoint, classify or establish compensation for employees

shall mean the exercise of such authority subject to the provisions of this section. This section shall not extend coverage of any section of this chapter, except those specifically named in this section, to any agency or employee. In accordance with sections 36.100, 36.110, 36.120 and 36.130, and after consultation with appointing authorities, the director of the division of personnel shall conduct such job studies and job reviews and establish such additional new and revised job classes as the director finds necessary for appropriate classification of the positions involved. Such classifications and the allocation of positions to classes shall be maintained on a current basis by the division of personnel. The director of the division of personnel shall, at the same time, notify all affected agencies of the appropriate assignment of each job classification to one of the salary ranges within the pay plan then applicable to merit system agencies. The affected agencies and employees in the classifications set pursuant to this section shall be subject to the pay plan and rates of compensation established and administered in accordance with the provisions of this section, and the regulations adopted pursuant to this section, on the same basis as for merit agency employees. In addition, any elected official, institution of higher learning, the department of transportation, the department of conservation, the general assembly, or any judge who is the chief administrative officer of the judicial branch of state government may request the division of personnel to study salaries within the requestor's office, department or branch of state government for classification purposes.

Missouri Revised Statutes: Chapter 36: Section 36.350 Sick and annual leaves--regulations to apply to all state agencies.

36.350. The regulations shall provide for the hours of work, holidays, attendance, and leaves of absence in the various

classes of positions subject to this law. They shall contain provisions for annual leave, sick leave, and special leaves of absence, with or without pay, or with reduced pay, and may allow special extended leaves for employees disabled through injury or illness arising out of their employment, and the accumulation of annual leave and sick leave. Such regulations shall apply in all state agencies.

Missouri Revised Statutes: Chapter 36: Section 36.380 Dismissal of employee--notice, how given--approval for reemployment, when.

36.380. An appointing authority may dismiss for cause any employee in his division occupying a position subject hereto when he considers that such action is required in the interests of efficient administration and that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the appointing authority gives to such employee a written statement setting forth in substance the reason therefor and files a copy of such statement with the director. When it is not practicable to give the notice of dismissal to an employee in person, it may be sent to the employee by certified or registered mail, return receipt requested, at his last mailing address as shown in the personnel records of the appointing authority. Proof of refusal of the employee to accept delivery or the inability of postal authorities to deliver such mail shall be accepted as evidence that the required notice of dismissal has been given. If the director determines that the statement of reasons for the dismissal given by the appointing authority shows that such dismissal does not reflect discredit on the character or conduct of the employee, he may, upon request of the employee, approve reemployment under section 36.240, in any class in which the employee has held regular status. Any regular employee who is dismissed shall have the right to appeal to the board as provided under section 36.390.

Missouri Revised Statutes: Chapter 36: Section 36.390 Right of appeal, procedure, regulation--nonmerit agencies may adopt-- dismissal appeal procedure--nonmerit agencies, not adopting, to establish similar system, exceptions.

36.390.5. Any regular employee who is dismissed or involuntarily demoted for cause or suspended for more than five working days may appeal in writing to the board within thirty days after the effective date thereof, setting forth in substance the employee's reasons for claiming that the dismissal, suspension or demotion was for political, religious, or racial reasons, or not for the good of the service. Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence at a hearing which, at the request of the appealing employee, shall be public. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of the evidence for and against a suspension or demotion, the board shall approve or disapprove such action and in the event of a disapproval the board shall order the reinstatement of the employee to the employee's former position and the payment to the employee of such salary as the employee has lost by reason of such suspension or demotion. After the hearing and consideration of the evidence for and against a dismissal, the board shall approve or disapprove such action and may make any one of the following appropriate orders:

(1) Order the reinstatement of the employee to the employee's former position and the payment to the employee of part or all of such salary as has been lost by reason of such dismissal;

(2) Sustain the dismissal of such employee, unless the board finds that the dismissal was based upon political, social, or religious reason, in which case it shall order the reinstatement of the employee to the employee's former position and the

payment to the employee of such salary as has been lost by reason of such dismissal;

(3) Except as provided in subdivisions (1) and (2) of this subsection, the board may sustain the dismissal, but may order the director to recognize reemployment rights for the dismissed employee pursuant to section 36.240, in an appropriate class or classes, or may take steps to effect the transfer of such employee to an appropriate position in the same or another division of service.

* * * * * *

7. The provisions for appeals provided in subsection 5 of this section for dismissals of regular merit employees may be adopted by nonmerit agencies of the state for any or all employees of such agencies.

8. Agencies not adopting the provisions for appeals provided in subsection 5 of this section shall adopt dismissal procedures substantially similar to those provided for merit employees. However, these procedures need not apply to employees in policy-making positions, or to members of military or law enforcement agencies.

9. The hearing shall be deemed to be a contested case and the procedures applicable to the processing of such hearings and determinations shall be those established by chapter 536, RSMo. Decisions of the personneL advisory board shall be final and binding subject to appeal by either party. Final decisions of the personnel advisory board pursuant to this subsection shall be subject to review on the record by the circuit court pursuant to chapter 536, RSMo.

Missouri Revised Statutes: Chapter 105: Section 105.055
State employee reporting mismanagement or violations of agencies, discipline of employee prohibited--appeal by employee from disciplinary actions, procedure--disciplinary action defined--violation, penalties.

105.055. 1. No supervisor or appointing authority of any state agency shall prohibit any employee of the agency from discussing the operations of the agency, either specifically or generally, with any member of the legislature or the state auditor.

2. No supervisor or appointing authority of any state agency shall:

(1) Prohibit a state employee from or take any disciplinary action whatsoever against a state employee for the disclosure of any alleged prohibited activity under investigation or any related activity, or for the disclosure of information which the employee reasonably believes evidences:

(a) A violation of any law, rule or regulation; or

(b) Mismanagement, a gross waste of funds or abuse of authority, or a substantial and specific danger to public health or safety, if
the disclosure is not specifically prohibited by law; or

(2) Require any such employee to give notice to the supervisor or appointing authority prior to making any such report.

* * * * * *

4. As used in this section, "disciplinary action" means any dismissal, demotion, transfer, reassignment, suspension, reprimand, warning of possible dismissal or withholding of work, whether or not the withholding of work has affected or will affect the employee's compensation.

5. Any employee may file an administrative appeal whenever the employee alleges that disciplinary action was taken against the employee in violation of this section. The appeal shall be filed with the state personnel advisory board; provided that the appeal shall be filed with the appropriate agency review board or body of nonmerit agency employers which have established appeal procedures substantially similar to those provided for merit employees in subsection 5 of section 36.390, RSMo. The appeal shall be filed within thirty days of the alleged disciplinary action. Procedures governing the appeal shall be in accordance with chapter 36, RSMo. If the board or appropriate review body finds that disciplinary action taken was unreasonable, the board or appropriate review body shall modify or reverse the agency's action and order such relief for the employee as the board considers appropriate . . . .

Missouri Revised Statutes: Chapter 411: Section 411.145
Department may conduct grain inspection business outside state, when.
411.145. The Missouri department of agriculture is hereby authorized to conduct official grain inspection business outside the boundaries of the state of Missouri; provided that, such business:

(1) Is conducted in a manner that is consistent with the provisions of this chapter concerning the providing of official grain inspection and weighing services;

(2) Is in compliance with the rules and regulations promulgated by the Federal Grain Inspection Service in regard to providing official inspection and weighing services; and

(3) Any expenditures involved are in compliance with the state of Missouri's budget process and the office of administration's rules, regulations and guidelines.

Merit System Rules and Regulations
for the
Division of Grain Inspection

Rule Number VI—General Provisions and Prohibitions:
Rule Number VI (1)(A). Demotions in, and dismissals from employment shall be made for cause under rules uniformly applicable to all positions of employment. No appointment, promotion, demotion, or dismissal shall be made because of favoritism, prejudice or discrimination.

Rule Number VI—General Provisions and Prohibitions:
Rule Number VI (2)(A).Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline, or any other aspect of personnel administration, because of political or religious opinions or affiliations or because of race, national origin, or any other non-merit factors is prohibited.

Rule Number VI (2)(B). An applicant or employee who feels himself adversely affected in his opportunity for employment, in his status as an employee, or in his condition of employment because of discrimination may under this rule appeal to the board for a review of the alledged (sic) discriminatory action or practice.

Rule Number VIII – Separation, Suspension, and Demotion:
(5) Dismissals – The director may dismiss for cause any employee in his division occupying a position subject to the classified service when he considers that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, prior to the effective date

thereof, the director gives to the employee a written statement setting forth in substance the reason therefor and files a copy of the statement with the board. If the board determines that the statement of reasons for the dismissal given by the director shows that the dismissal does not reflect discredit on the character or conduct of the employee, they may upon request of the employee, approve reemployment eligibility in an appropriate class or classes. Any regular employee who is dismissed shall have the right to appeal to the board as provided in these rules.

Rule Number XIV – Appeals:

(1) Appeals of examination applicants and employees are provided under the following circumstances:

(D) Appeals from dismissal, demotion, or suspension – Any regular employee who is dismissed, demoted, or suspended for more than three days may appeal in writing to the board within thirty days after the effective date thereof, setting forth in substance his reasons for claiming that the dismissal, suspension, or demotion was for political, religious or racial reasons, or not for the good the service. Upon the appeal, both the appealing employee and the supervisory official whose action is reviewed shall have the right to be heard and to present evidence at a hearing. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of evidence for and against a suspension or demotion, the board shall approve or disapprove the action and in the event of a disapproval the board shall order the reinstatement of the employee to his former position and the payment to the employee of salary he has lost by reason of the suspension or demotion, After the hearing and consideration of the evidence for and against a dismissal the board shall approve or

disapprove the action and make any of the following appropriate orders:

(1) Order the reinstatement of the employee to his former position and the payment to the employee part or all of the salary he has lost by reason of the dismissal;

(2) Sustain the dismissal of the employee, unless the board finds that the dismissal was based upon political, social, or religious reason, in which case it shall order the reinstatement of the employee to his former position and the payment to the employee of the salary he has lost by reason of the dismissal;

(3) Except as provided above, the board may sustain the dismissal but may order the director to recognize reemployment rights for the dismissed employee in an appropriate class or classes, or may take steps to effect the transfer of the employee to a comparable position in another department.

EXECUTIVE OFFICE
STATE OF MISSOURI
JEFFERSON CITY

EXECUTIVE ORDER

WHEREAS, the United States Grain Standards Act as amended requires that a state agency must employ personnel on the basis of job qualifications rather than political affiliations in order to qualify for designation as an official agency to perform inspection and weighing or supervision of weighing functions; and

WHEREAS, the Division of Grain Inspection, Weighing and Warehousing in the Missouri Department of Agriculture needs to qualify for designation as an official agency under the Grain Standards Act;

NOW, THEREFORE, I, JOSEPH P. TEASDALE, Governor of the State of Missouri, do hereby order and direct as follows:

The Director of the Department of Agriculture shall establish, for the employees of the Missouri Department of Agriculture's Division of Grain Inspection Weighing and Warehousing, a system of personnel administration based on merit principles and designed to secure efficient administration. The system established shall be consistent with the following merit principles:

1. Recruiting, selecting and advancing employees on the basis of their relative ability, knowledge and skills, including open consideration of qualified applicants for initial appointment;

2. Establishing pay rates consistent with the principle of providing comparable pay for comparable work;

3. Training employees, as needed, to assure high quality performance;

4. Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; and

5. Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to race, color, national origin or ancestry, political affiliation, sex, or religious creed and with proper regard for their privacy and constitutional rights as citizens.

The Director shall prepare a plan to establish a system of personnel administration based on merit principles as described above and file it with the Secretary of State on or before February 15, 1978. The plan shall be effective as of the date it is filed with the Secretary of State.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson this 1st day of February, 1978.

/s/ Joseph P. Teasdale
GOVERNOR

ATTEST:

/s/ James C. Kirkpatrick
SECRETARY OF STATE

DEPARTMENT OF AGRICULTURE
STATE OF MISSOURI
JEFFERSON CITY

June 10, 1994

Mr. Tommy Hopkins
Missouri Department of Agriculture
P. 0. Box 630
Jefferson City, Missouri 65102

Dear Tommy:

Please be advised that you are hereby terminated from employment with the Missouri Department of Agriculture effective at noon today.

You are entitled to payment of all vacation and compensatory time accrued as of this date. Payment for this amount will be forwarded to your home address.

You are also entitled to health insurance benefits as provided under federal law. This office will forward pertinent information on your health insurance benefits to your home address.

Sincerely,

/s/ John L. Saunders

John L. Saunders
Director of Agriculture

JLS:sk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
MISSOURI, CENTRAL DIVISION

TOMMY D. HOPKINS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 94-4458-CV-C-SOW
	)	
JOHN L. SAUNDERS,	)	
KYLE VICKERS and	)	
CHARLES AUSFAHL,	)	
	)	
Defendants.	)	

PLAINTIFFS REQUEST FOR JURY TRIAL

Plaintiff Tommy D. Hopkins, hereby requests a jury trial in the above-styled cause of action.

Respectfully submitted,

VENTERS, PLETZ & REED, P.C.

By: /s/ Jerry W. Venters
Jerry W. Venters

325 Jefferson Street
P. 0. Box 1048
Jefferson City, Missouri 65102
Telephone: (314) 635-8500

Attorneys for Plaintiff.